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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,

Appellant,

v.

ADIRONDACK LEAGUE CLUB,

Defendant-Appellee.

JURISDICTIONAL STATEMENT.

On Appeal From the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1956

Index.

	Page
Jurisdictional Statement	1
A. Reference to official and unofficial reports	2
B. The grounds on which the jurisdiction of the Supreme Court of the United States is invoked	3
(i) Nature of this proceeding and its statutory basis	3
(ii) Date of judgment sought to be reviewed; date and places of filing notice of appeal	4
(iii) Statutory provision conferring jurisdiction of this appeal in the Supreme Court of the United States	4
(iv) Cases believed to sustain the jurisdiction of the Supreme Court of the United States	5
(v) The validity of the following state statute is involved	5
C. Questions presented by this appeal	6
D. A concise statement of the case	8
E. The federal questions are substantial	17
H. Appended to this statement are copies of all unreported opinions or memoranda as required by Rule 15(h)	22
I. A copy of the order of the New York Court of Appeals from which this appeal is taken is appended hereto	22

Page

Appendix:

Stokes Act 23
Order of the Court of Appeals Appealed From 25
Supplemental Memorandum 27
Opinion of Appellate Division, Fourth Department, Dated May 27, 1953 (McCurn, J.) 28
Opinion of the Court of Appeals 46
Memorandum Decision by Court of Appeals 56

CASES CITED:

Black River Regulating District v. Adirondack League Club, 282 App. Div. 161, 121 N. Y. Supp. 2d 893 (4th, 1953) 13
Cole v. Violette, 319 U. S. 581 (1943) 5
County Board of Arlington County, Virginia, *et al.*, v. State Milk Commission, 346 U. S. 932 (1954) 5
County Board v. State Milk Commission, 346 U. S. 932 (1954) 17, 21
Department of Banking v. Pink, 317 U. S. 264 at 267 (1942) 5
Dorsey v. Stuyvesant Town Corporation, 299 N. Y. 512, 87 N. E. 2d 426 (1949), c. d. 339 U. S. 981 (1950) 18
Grand Trunk Railway Company v. City of South Bend, 227 U. S. 544 (1912) 5, 19, 21
Matter of Arbitration, Stern, Morgenthau & Co., and Wm. Penn Fire Insurance Co., 308 N. Y. Mem. 961, 963 (1955) 19
Murray v. LaGuardia, 291 N. Y. 320, 52 N. E. 2d 884 (1943) 18
Russell v. Sebastian, 233 U. S. 195 (1913) 5, 20

STATUTES:

Page

Conservation Law:
Section 445 3
Section 432 8
Section 431 18

Constitution of the State of New York:
Article 14, Section 2 ..... 4, 6
Article 1, Section 10 8

United States Code, Title 28:
Section 1257 ..... 4, 5
Section 2103 5

The "Stokes Act" Chapter 803 of the Laws of 1950:
Section 445 ..... 3, 5, 13, 16, 19

New York Civil Practice Act:
Article 78 10

OTHER AUTHORITY:

Harvard Law Review 132 (1955) 17

In the

Supreme Court of the United States

October Term, 1955, No. .

The Board of the Black River Regulating District, Appellant, v. Adirondack League Club, Defendant.	

On Appeal From the Court of Appeals of the State of New York.

Jurisdictional Statement.

Appellant appeals from a final judgment of the Court of Appeals of the State of New York, consisting of an order dismissing an appeal to the Court of Appeals from the Supreme Court, Appellate Division, Fourth Department. The order of the New York Court of Appeals was entered on October 13, 1955. This statement is submitted under Rule 15 to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented for determination.

(A)

Reference to official and unofficial reports.

The New York Court of Appeals wrote no opinion in deciding the present case. A brief memorandum by the Reporter, 309 N. Y. 798, is found in the Advance Sheet of December 10, 1955, No. 867. This memorandum is set forth in the appendix.

Opinions in two previous connected cases are reported as follows:

1) *In the Matter of Adirondack League Club*, Petitioner, *v. Board of Black River Regulating District, et al.*, Respondents; and *In the Matter Adirondack Moose River Committee, Inc., et al.*, Petitioners, *v. Board of Black River Regulating District, et al.*, Respondents, 275 App. Div. 618, 92 N. Y. Supp. 2d 256 (4th Dp. 1949); reversed 301 N. Y. 219, 93 N. E. 2d 647 (1950).

2) *Black River Regulating District* and *William R. Adams, Henry E. Smith* and *Alfred H. Stiles, Jr.*, individually and as the Board of the Black River Regulating District, Plaintiffs-Respondents, *v. Adirondack League Club*, Defendant-Appellant, 201 Misc. 808, 115 N. Y. Supp. 2d 572 (Bastow, J.).

A supplementary memorandum of Justice Bastow, dated April 12, 1952, is unreported; a copy is appended as provided in Rule 15, subparagraph (h); reversed 282 App. Div. 161, 121 N. Y. Supp. 2d 893 (4th Dp. 1953); reversed 307 N. Y. 475, 121 N. E. 2d 428 (1954); motion for reargument and to amend remittitur denied, 307 N. Y. 906, 123 N. E. 2d 562 (1954).

(B)

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked.

(i) Nature of this proceeding and its statutory basis.

This is a proceeding brought to take by eminent domain certain lands in the State of New York owned by the Adirondack League Club, in order to impound water thereon by the construction of a proposed reservoir. The statute pursuant to which this proceeding is brought is the Conservation Law of the State of New York, Article VII, "River regulation by storage reservoirs" and in particular Section 446 of that Article entitled "Acquisition of Real Estate." In general terms that statute gives to such corporations as the appellant the right to condemn for its use any real estate whose condemnation is determined to be necessary in order to carry out the duties of the District.

Relevant also is an amendment to §445 of the Conservation Law, effective April 20, 1950, popularly known as the Stokes Act, constituting Chapter 803 of the Laws of 1950. The appellant here contends that the Stokes Act is unconstitutional under the Contract Clause and the Fourteenth Amendment. The Stokes Act reads,

> "No reservoirs for the regulation of the flow of streams or for any other purpose except for municipal water supply shall be hereafter constructed in Hamilton or Herkimer Counties on the south branch of the Moose River by any river regulating board."

Also involved, although not directly affecting the land for which condemnation is sought in this proceeding, is the "Ostrander Amendment" to the New York Constitu-

tion, approved November 3, 1953, effective January 1, 1954, which so amended Article 14 of the Constitution of the State of New York, Section 2, as to revoke authority, existing previous thereto, to use lands owned by the state and constituting part of the "Forest preserve" for the construction of reservoirs to regulate the flow of streams.

(ii) Date of judgment sought to be reviewed; date and places of filing notice of appeal.

The date of the order, constituting a judgment of the Court of Appeals, here sought to be reviewed, is the 13th day of October, 1955. It was entered in the New York Court of Appeals on that day. There has been no order respecting a rehearing. The notice of appeal to the Supreme Court of the United States herein was filed on January 9, 1956. The notice of appeal was filed in the offices of the Clerk of New York Court of Appeals; of the Clerk of the Appellate Division, Fourth Department; and in the office of the Clerk of the Supreme Court, Jefferson County. It was filed with all three clerks to the end that it might with certainty be filed with the Clerk of the Court possessed of the record.

(iii) Statutory provision conferring jurisdiction of this appeal in the Supreme Court of the United States.

The statutory provision believed to confer on this Court jurisdiction of this appeal is Title 28, United States Code, Section 1257 (2). If, contrary to the opinion of the appellant, the proper mode of review herein as to all or part of the issues for which review is here sought should be by petition for certiorari rather than appeal, the appellant requests that pursuant to Title 28, United States

Code, Section 2103, these papers be regarded and acted on as a petition for a writ of certiorari.

(iv) Cases believed to sustain the jurisdiction of the Supreme Court of the United States.

That the New York Court of Appeals order is a "final judgment or decree" under Title 28, United States Code, Section 1257; *Department of Banking v. Pink*, 317 U. S. 264 at 267 (1942); *Cole v. Violette*, 319 U. S. 581 (1943).

That whatever "public character" the appellant has does not deprive it of standing to sustain the jurisdiction of the Supreme Court of the United States on this appeal; *County Board of Arlington County, Virginia, et al.*, Appellant, *v. State Milk Commission*, 346 U. S. 932 (1954).

That the appellant's substantive rights are violated by the Stokes Act of the New York Legislature, Chapter 803 of the Laws of 1950; *Grand Trunk Railway Company v. City of South Bend*, 227 U. S. 544 (1912); *Russell v. Sebastian*, 233 U. S. 195 (1913).

(v) The validity of the following state statute is involved:

The "Stokes Act," Chapter 803 of the Laws of 1950, amending the New York Conservation Law, Section 445,

> "No reservoirs for the regulation of the flow of streams or for any other purpose except for municipal water supply shall be hereafter constructed in Hamilton or Herkimer Counties on the south branch of the Moose River by any river regulating board."

In 1953, the Constitution of the State of New York, Article 14, Section 2, was amended by the "Ostrander Amendment" to prevent the use for river regulation purposes of lands owned by the State of New York in the forest preserve. In the pending case here under appeal, only lands of Adirondack League Club, not part of the forest preserve, are directly concerned. Therefore the "Ostrander Amendment" is not directly here involved.*

(C)

Questions presented by this appeal.

Jurisdictional Questions.

1. Has the Black River Regulating District, a body corporate created under Article 7 of the Conservation Law of the State of New York, and by that statute "declared to be public corporation[s]," appellant herein, standing to obtain review in the Supreme Court of the United States, of a final judgment of the New York Court of Appeals, by reason of the purported impairment, by the State of New York, through supervening legislation, of certain rights prior thereto granted by the State of New York vested in the appellant, and vested in certain private persons, corporate and other, for whom the appellant officially acts, all in violation of Article 1, Section 10, Clause 1, and of the Fourteenth Amendment of the Constitution of the United States?

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* *A fortiori* there has no bearing on this case a proposed amendment to the New York Constitution, twice passed by the Legislature, which would have had the effect of authorizing the appellant District to use certain State-owned forest preserve lands (see Senate No. 1671, McKinney's Session Laws of New York, 1955, page LXXIII) but which was rejected by popular vote in November, 1955.

2. Is there any adequate state ground to sustain the judgment of the New York Court of Appeals, dated October 13, 1955, by reason of the preceding judgment of the said Court of Appeals, dated July 14, 1954, entered after the handing down of the opinion of the Court reported in 307 N. Y. 475 (1954)?

3. Is there any other adequate state ground which will preclude the appellant herein from maintaining this appeal?

Substantive Question.

Where the State of New York duly authorized the appellant to construct, and charged it with the duty to construct, reservoirs and other appropriate hydraulic regulating works, to control the flow of the Black River; and pursuant to this purpose the state authorized the appellant to take by eminent domain land from the defendant-appellee Adirondack League Club; and where the appellant entered into these duties, constructed one similar reservoir on another tributary of the Black River, and otherwise commenced the regulation of the flow of that river; and where the appellant proceeded with plans and preliminary work for the construction of a second reservoir, part of which would require taking a portion of the land of the appellee Adirondack League Club; and where the appellant, through its Board, issued certain certificates of indebtedness to provide funds for the conduct of its work, including part of the preliminary cost of construction of the reservoir which would require the taking of part of the Adirondack League Club's lands; and where these certificates were purchased by various persons in reliance on the completion of the reservoir and in reliance on the future lawful levy of assessments based on benefits created by these improvements: could

the State of New York thereafter, consistently with the "Contract Clause," Article 1, Section 10, Clause 1, and the Fourteenth Amendment of the United States Constitution, by the passage of a supervening state statute, prevent the taking of lands of the Adirondack League Club and the construction of the reservoir, and thereby impair the appellant's capacity to continue the regulation of the flow of the Black River, and further impair, to the extent that benefits originally granted to persons owning assessable properties on the streams below the proposed dams are now purportedly withdrawn, the capacity of the appellant to pay the certificates of indebtedness mentioned above?

(D)

A concise statement of the case.

The Black River Regulating District was formed in 1919 under Section 432 of the Conservation Law of the State of New York. The formation of the appellant District was voluntary, and was made upon the petition of the City of Watertown and other municipalities and taxpayers within the watershed. The appellant District thereafter, with the approval of the Water Power and Control Commission of the State of New York, made a general plan for the regulation of the stream flow of the Black River. This "official plan" of the District, approved by the Water Power and Control Commission of the State of New York, and on file in the appropriate state office since 1920, has always included a plan for a river regulating reservoir on the south branch of the Moose River, an affluent of the Black River. This Moose River Reservoir is the one here in controversy.

The appellant District in the years 1923, 1924 and 1925, constructed the Stillwater Reservoir on the tributary Beaver River of the Black River system, and is still operating that reservoir. The District has also taken over, and has maintained and operated the Fulton Chain system of hydraulic regulation continuously since the District began operations in or about 1920.

The appellant District prior to the passage of the Stokes Act had done certain preliminary work on the Panther Mountain Reservoir, here in issue, an integral part of the original plan of regulation. The Board made extensive investigations, surveys, maps, plans and studies including payment of engineering and legal costs and other necessary preliminaries for its construction in accordance with law, all of which were approved after the required public hearing, and the final order of the District Board was filed in each of the required County Clerk's offices on or about November 23, 1948. The appellant District had issued and outstanding $203,000 of certificates of indebtedness, the principal part of which was used for the preliminary work on the preparation for constructing the Panther Mountain Reservoir. Thereafter, on April 20, 1950, the New York State Legislature passed and the Governor of the state approved the "Stokes Act" which is set forth above, and which purported to prohibit further work by the District on the Panther Mountain Reservoir. [It is perhaps significant that the Stokes Act is so specifically directed at the appellant, which is the only River Regulating Board to which it applies, that the appellee Adirondack League Club could, for all that the Stokes Act provides, build a dam and flood precisely the area here in question.]

On this appeal the appellant contends that the "Stokes Act" is unconstitutional under the "Contract Clause" and under the Fourteenth Amendment of the Federal

Constitution. The appellant considers that the so-called "Ostrander Amendment" to the New York Constitution which took effect on January 1, 1954, and which purports to prohibit the use of any state-owned land in the forest preserve for river regulating purposes,* is not germane to this appeal, as no land of the State of New York is sought in these eminent domain proceedings. In case, however, the Court should consider that the "Ostrander Amendment" in anywise applies to the appellant's situation, the appellant will contend that the "Ostrander Amendment" as thus applied is also unconstitutional, under the same provisions of the Federal Constitution.

This appeal occurs in the third of three legal proceedings concerning the Panther Mountain Reservoir. These three are as follows:

1. A proceeding under Article 78 of the New York Civil Practice Act to review in the New York Supreme Court the determination of the appellant District to construct the Panther Mountain Reservoir. On September 28, 1949, the New York Appellate Division, Fourth Department, unanimously held in that proceeding that the determination of the District "that public welfare requires the construction of Panther Mountain Reservoir * * * and directing that its construction proceed according to proposed plans," be confirmed.*

The petitioners, Adirondack League Club and Adirondack Moose River Committee, Inc., thereupon appealed to

* See Assembly No. 2159, McKinney's 1953 Session Laws of New York, page LXXVII.

* *In the Matter of the Application of Adirondack League Club*, Petitioner, *v. Board of the Black River Regulating District; In the Matter of the Application of Adirondack Moose River Committee, Inc., v. Board of the Black River Regulating District*, 275 App. Div. 618, 92 N. Y. Supp. 2d 256 (4th Dp. 1949).

the New York Court of Appeals. While such appeal was pending the New York Legislature enacted the Stokes Act, which by its terms was obviously directed at the appellant District, which provided:

> "* * * No reservoirs for the regulation of the flow of streams or for any other purpose except for municipal water supply shall be hereafter constructed in Hamilton or Herkimer counties on the south branch of the Moose River by any river regulating board." [Laws of 1950, Ch. 803.]

The New York Court of Appeals decided the case after the Stokes Act had taken effect. On July 11, 1950, that Court, stating that the constitutionality of the Stokes Act "is a problem which we postpone for later consideration since it is not now before us," reversed the Appellate Division and directed dismissal of the petition "solely upon the ground that the issues are moot." This opinion appears in 301 N. Y. 219, 93 N. E. 2d 647 (1950).

2. Thereupon the District instituted two other actions in the New York Supreme Court. The first of these was brought by the District, by its Board and by the members of the Board of the District individually, against the Adirondack League Club. The complaint (see Record on Appeal, p. 9* herein) asked judgment determining and declaring the rights of the parties, and particularly determining and declaring that the District is entitled to maintain condemnation proceedings against Adirondack League Club to acquire the lands necessary for the Panther Mountain Reservoir, and that the Stokes Act is invalid and unconstitutional insofar as it might seem to restrict the District from proceeding with and completing the Panther Mountain Reservoir work. The New York Supreme Court, Special Term, Jefferson County, in an opinion by Justice Bastow, 201 Misc. 808.

* This reference is to the record in the declaratory judgment action.

115 N. Y. Supp. 2d 572 (1953), dismissed the complaint and granted summary judgment in favor of the defendants. At the end of Mr. Justice Bastow's opinion he stated:

> "* * * the determination and final order made by the plaintiff Board on November 11, 1948, became null and void upon the dismissal of the petitions by this court pursuant to the direction of the Court of Appeals. In contemplation of law, no plan for the construction of a reservoir at Panther Mountain now exists and the plaintiff is not entitled to maintain condemnation proceedings against the defendant to acquire lands owned by it for construction of Panther Mountain Reservoir.
>
> "This conclusion having been reached it followed that plaintiffs may not prosecute this action for the sole purpose of obtaining an advisory opinion as to the constitutionality of Chapter 803 of the Laws of 1950 (Stokes Act) for there is no justiciable issue presented (cf. *James v. Alderton Dock Yards*, 256 N. Y. 298, 305; *Reed v. Littleton*, 249 App. Div. 310, 312). The individual plaintiffs have no legal capacity to test the constitutionality of the Act (*Bull v. Stichman*, 273 App. Div. 311, affd. 298 N. Y. 516).
>
> "The defendant is entitled to an order dismissing the complaint and granting summary judgment. The remaining motions are dismissed as they are now academic."

Mr. Justice Bastow then handed down a supplemental opinion, dated April 12, 1952 (see Record on Appeal, p. 65):

> "Upon the settlement of the order to be entered upon the court's decision of March 24, 1952, a question has been raised as to the scope of that decision. To clarify the matter, the court has not passed upon or decided the questions as to the alleged unconstitutionality of the Stokes Act (Laws 1950, chapter 803) attempted to be raised by the complaint of the plaintiff."

The District thereupon appealed to the Appellate Division, Fourth Department, which unanimously reversed, on the law and the facts, the Special Term order dismissing the complaint. The Appellate Division indicated that the plaintiffs had an independent interest (by reason of their liability on the outstanding certificates of indebtedness), separate and apart from their status as an agency of the state, to test the constitutionality of the Stokes Act. See *Black River Regulating District v. Adirondack League Club*, 282 App. Div. 161, 121 N. Y. Supp. 2d 893 (4th, 1953).

The Appellate Division then granted leave to appeal to the Court of Appeals and certified seven questions of law. The New York Court of Appeals on July 14, 1954, answered in the affirmative the following questions, certified by the Appellate Division:

1. Did this Court err as a matter of law in reversing the order and judgment of the Special Term?

2. In the alternative, and under Rule 113 of the Rules of Civil Practice, was the defendant entitled, as a matter of law, to judgment dismissing the complaint?

3. Were the plaintiffs, as a matter of law, without power or standing to question the constitutional power of the State Legislature to adopt the so-called Stokes Act, being Chapter 803 of the Laws of 1950?

The Court of Appeals refused to answer any other questions and reversed the order of the Appellate Division, remitting the matter for further proceedings in accordance with the opinion of the Court of Appeals. The New York Court of Appeals observed:

> "Having reached the conclusion that the Stokes Act is constitutional and that the plaintiffs lack status to challenge its validity, we see no necessity for passing on any other question." *Black River Regulating District, et al., v. Adirondack League Club*, 307 N. Y. 475, 489-90, 121 N. E. 2d 428 (1954).

3. The District then proceeded with the present action to condemn lands of the Adirondack League Club. The proceeding which has resulted in the present appeal was begun by service of petition and notice on July 21, 1951. Defendant answered August 3, 1951, and the matter was held pending disposition of the action for declaratory judgment described in paragraph 2 immediately above. The defendant by notice of motion dated October 18, 1954, and accompanying affidavits moved to dismiss the petition. This motion was granted by Justice Kingsley of the New York Supreme Court, by an order entered in Jefferson County Clerk's office December 22, 1954, and judgment was entered thereon on December 27, 1954. No opinion was rendered at the Special Term. The plaintiff District thereupon appealed to the Appellate Division, Fourth Department, which affirmed the judgment dismissing the complaint with a short memorandum, dated April 27, 1955, reported 285 App. Div. 1115, 140 N. Y. Supp. 2d 538. The memorandum reads as follows:

> "The Board of the Black River Regulating District, Appellant, v. Adirondack League Club, Respondent—Judgment and order affirmed without costs of this appeal to either party. Memorandum: We think the decision in the former action (*Black River Regulating District v. Adirondack League Club*, 307 N. Y. 475) requires us to affirm the judgment dismissing the complaint. In that decision the Court said at page 489: 'The plaintiffs * * * are effectively barred from maintaining

> condemnation proceedings. * * *' We are bound by that decision. All concur. (Appeal from a judgment of Jefferson Special Term, Kingsley, J., dismissing the proceeding to condemn real property belong to defendant for the purpose of construction and maintenance of the Panther Mountain Reservoir.) Present: McCurn, P. J., Vaughan, Piper, Wheeler and Van Duser, JJ."

Judgment of affirmance was entered in Jefferson County Clerk's office on May 5, 1955. Plaintiff appealed to the New York Court of Appeals on constitutional grounds by notice of appeal filed and served June 27, 1955. The Court of Appeals dismissed the appeal, on motion of the appellee Adirondack League Club, on October 13, 1955 (309 N. Y. 798). The first ground of the Club's motion as stated in its papers was as follows:

> "Although this appeal is expressly stated to be taken solely 'as a matter of right under Section 588, Subdivision 1 (a), of the Civil Practice Act,' neither as a matter of fact nor as a matter of law is there directly involved the construction of the Constitution of the State or of the United States."

Other stated grounds were that the appeal was "sham," an illegitimate attempt to secure re-argument of the decisions in 307 N. Y. 475 and 906, and finally that the necessary papers had not been filed and served. The Court of Appeals in its order of dismissal stated no ground.

From this latter order the present appeal was taken to the Supreme Court of the United States.

The stage in the state proceedings below at which there was raised the constitutional question of which review is here sought is hereby stated as required by Rule 15 (d). The answer of the defendant-appellee, Adirondack League Club, herein, in paragraph 5 (Rec-

ord herein, p. 12) sets up the Stokes Act, Chapter 803 of the New York Laws of 1950, as a bar to the plaintiff's action for condemnation of real property. The defendant thereafter on October 18, 1954, moved to dismiss the proceeding. In opposition to that motion Bernard A. Gray, president of the Board of the Black River Regulating District, submitted his affidavit, dated December 7, 1954 (Record herein, pp. 19, 20), which contained the following statement:

> "That plaintiff District and the Board desire if possible to have issues of constitutionality of the Stokes Act, so-called, and the amendment to the New York State Constitution, Article XIV, Section 2, adopted on November 3, 1953, passed upon by the United States Supreme Court.
>
> "That in the opinion of the deponent and as the plaintiff has been advised by its counsel, plaintiff District was granted and has a vested right and franchise to complete the improvement and regulation of the Black River by construction of the Panther Mountain Reservoir, so-called, upon the tributary south branch of the Moose River and that under the Constitution of the United States and the Constitution of the State of New York such vested right and franchise cannot be taken from it by the Stokes Act, so-called, or by the amendment to the New York State Constitution adopted in November, 1953."

With the issue of constitutionality thus before it the Special Term granted the motion of the defendant and the Clerk of the Supreme Court in and for Jefferson County, New York, entered judgment dismissing the proceeding with prejudice (Record, pp. 28 to 29). The practice in the courts of the State of New York does not require that constitutional or other grounds of appeal be stated in a notice of appeal to the Appellate Division (see Civil Practice Act, Section 562) and the notice of appeal to that court accordingly specified no

grounds (Record, p. 31). The short memorandum of decision by the Appellate Division of the Supreme Court made no mention of the constitutional question. The notice of appeal to the Court of Appeals (Record, p. 36) stated that there was directly involved the construction of the Constitution of the United States, which is sufficient under New York practice to raise the questions here at issue. The order of dismissal by the Court of Appeals stated no ground (Appendix, p. 25).

(E)

The federal questions are substantial.

This appeal presents substantial questions of general importance not only concerning the standing of the appellant, but also concerning the appellant's substantive constitutional rights.

In 1954 the United States Supreme Court, in *County Board v. State Milk Commission*, 346 U. S. 932 (1954), passed on the merits of a controversy in which a Virginia county contended that the constitutional rights of its citizens were invaded by an order of the State Milk Commission which, so the county contended, was in contravention of the Commerce Clause of the United States Constitution. See A Commentary on this case in 68 Harvard Law Review 132 (1955). At the special direction of the United States Supreme Court the jurisdictional question in that case was separately briefed, Arlington County contending that it represented its several citizens and therefore had standing to appeal and to obtain an adjudication on the merits of its contentions under the Commerce Clause. In a precisely similar manner the Black River Regulating District before this Court speaks for and represents the interests of those individual and corporate non-governmental per-

sons adversely affected by the order of the New York Court of Appeals here appealed from.

While the appellant is by statute (N. Y. Conservation Law, Section 431) denominated a "public corporation," that label should not for all purposes conclusively fix the appellant's character for purposes of review in this court. Some corporations have in part a public and in part a private character. See, e. g., *Murray v. LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884 (1943); *Dorsey v. Stuyvesant Town Corporation*, 299 N. Y. 512, 87 N. E. 2d 426 (1949), c. d. 339 U. S. 981 (1950).

If the plaintiff cannot maintain this appeal, there appears to be no person who can challenge the constitutionality of the Stokes Act, passed for specific application to the plaintiff only, a piece of legislation which in nowise restricts the appellee, Adirondack League Club, from damming up on its own land exactly the waters which the plaintiff is here forbidden to impound in the completion of its duties.

Another very substantial question of standing concerns the effect herein of the second action in the New York Court of Appeals; see the opinion in 307 N. Y. 475, 121 N. E. 2d 428 (1954). The supplemental memorandum of Justice Bastow at Special Term expressly disclaimed passing on the constitutionality of the Stokes Act (Appendix, p. 27). The Appellate Division reversed the Special Term dismissal, but the Court of Appeals in turn reversed the Appellate Division and stated that in reversing the Special Term the Appellate Division had erred as a matter of law. The Court of Appeals found that the defendant, Adirondack League Club, was entitled as a matter of law to judgment dismissing the complaint, which is exactly the step taken by the Justice Presiding at Special Term. The Court of Appeals also, answering question No. 3, stated that the plain-

tiffs, Black River Regulating District and others, were without power or standing to question the constitutional power of the State Legislature to adopt the Stokes Act, and in its opinion, 307 N. Y. 475, 121 N. E. 2d 428 (1954), elsewhere states that the present appellant had there no standing to challenge the constitutionality of the Stokes Act. The Court of Appeals does at one point in its opinion add the clause "having reached the conclusion that the Stokes Act is constitutional" but goes on to state that the plaintiffs lack status to challenge its validity. The appellant here takes the position that its constitutional rights were never decided by the New York Court of Appeals.

The New York Court of Appeals gave no reason for its dismissal on October 13, 1955, of the District's appeal herein. That Court sometimes dismisses because it deems the substantive question unsubstantial (see, e. g., *Matter of Arbitration, Stern, Morgenthau & Co., and Wm. Penn Fire Insurance Co.*, 308 N. Y. Mem. 961, 963 [1955]). In the absence of any statement of a reason for dismissal, the United States Supreme Court should not presume that the New York Court of Appeals dismissed on an exclusively state ground.

Beside the substantial questions of standing, there is an important question of substance in this case. In *Grand Trunk Western Railway Company v. City of South Bend and Others*, 227 U. S. 544 (1913), the following facts were before this Court. The city council of South Bend in 1868, granted to the plaintiff's predecessor the right to lay a double track over a certain street. The Railway Company built a single track in 1871 and a double track for part of the way in 1881, but when the company in 1902, sought to extend the double tracking for the balance of the authorized distance, it was prevented from doing so because the city had repealed so much of the ordinances of 1868,

as related to double tracks. The Indiana Courts upheld the repealer. The United States Supreme Court reversed on the ground that the repealer had invaded a contract made by the city in 1868, in violation of Article 1, Section 10, of the Constitution.

In *Russell v. Sebastian*, 233 U. S. 195 (1914), the facts were as follows: A provision of the California State Constitution of 1879, as amended in 1885, provided that in any city where there was no municipal lighting plant, an incorporated company might under the direction of municipal officials, "have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light. * * *" In 1909, the Economic Gas Light was organized and bought an existing plant in Los Angeles for gas distribution. It somewhat extended its system prior to October 10, 1911. On that date the State Constitution provision in question was amended to include this clause "Persons or corporations may establish works for supplying the inhabitants with such services, upon such conditions and under such regulations as the municipality may prescribe under its organic law, * * *" Thereupon, by an ordinance approved October 26, 1911, the City of Los Angeles passed an ordinance providing that no one should exercise any franchise to lay or maintain pipes without obtaining a grant from the city. Another ordinance a few months later made it unlawful to excavate in the street without written permission from the Board of Public Works. The Gas Light Company was denied permission to excavate and lay pipes solely on the ground that it had not obtained a franchise under the ordinance; the company was nevertheless proceeding to open a trench for additional pipes when its representative was arrested. The employee was convicted under

the ordinance, and sought a writ of habeas corpus in the state courts, contending that the supervening constitutional amendment of 1911, and the municipal ordinances adopted pursuant thereof, were ineffectual under the contract clause and the fourteenth amendment of the United States Constitution, to impair rights which had vested in the Gas Light Company. The Supreme Court of California, refusing habeas corpus, held that the grant under the earlier constitutional provision took effect only upon acceptance on the part of the Gas Light Company by actually taking possession and occupying the street.

The Supreme Court of the United States, on error to the Supreme Court of California to review its decree refusing habeas corpus, reversed and remanded. In an opinion by Mr. Justice Hughes, it held that the Gas Light Company's rights had vested under the old state constitutional provision, not only as to pipes already laid, but also as to prospective extensions of its mains for the purpose of distributing its gas supply to the inhabitants of the city.

The Supreme Court of the United States has never repudiated the doctrines of the *Grand Trunk v. City of South Bend* and *Russell v. Sebastian*. The appellant Black River Regulating District here contends that the Stokes Act impairs its vested rights in violation of the contract clause and the fourteenth amendment, just as the ordinance of the City of South Bend, and the state constitutional amendment of California and the ordinance of the City of Los Angeles did in the two cases cited; the Black River Regulating District contends that the Stokes Act is unconstitutional for the same reasons. The District further contends that under the doctrine of *County Board v. State Milk Commission*, 346 U. S. 932 (1954), the appellant's "public" character is not sufficient under the circumstances to bar it from effective as-

sertion in this court of these constitutional rights; and it further contends that nothing in the proceedings of the New York Court of Appeals which culminated in the opinion reported at 307 N. Y. 475 (1954), or in any other state proceedings, stands in the way of the review here sought.

(H)

Appended to this statement are copies of all unreported opinions or memoranda as required by Rule 15(h).

(I)

A copy of the order of the New York Court of Appeals from which this appeal is taken is appended hereto.

The appellant submits that this Court should note probable jurisdiction and should direct that the case be argued orally. In any event this Court should not dismiss or affirm on these papers; if the Court deems the jurisdictional questions doubtful, it should postpone the question of jurisdiction until the hearing of the case on the merits.

Respectfully submitted,

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Cambridge,
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APPENDIX.

Stokes Act.

LAWS OF NEW YORK—1950

CHAPTER 803

AN ACT to amend the conservation law, in relation to prohibiting the construction of new or additional reservoirs on the south branch of the Moose river in the counties of Hamilton and Herkimer.

Became a law April 20, 1950, with the approval of the Governor. Passed, by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section four hundred forty-five of the conservation law, as added by Chapter six hundred sixty-two of the laws of nineteen hundred fifteen, is hereby amended to read as follows:

§445. GENERAL POWERS. The board on behalf of such district shall have and may exercise all the powers enumerated in section four hundred and thirty-one of this article and in addition thereto all such other powers as are necessary and proper to carry into execution the powers expressly granted to it; it shall have charge of the operation of all reservoirs now in existence, or hereafter constructed for the regulation of the flow of the river and its tributaries of the district which it represents, not including, however, any reservoirs which are or may be maintained primarily to provide water for the canal system of the state. *No reservoirs for the regulation of the flow of streams or for any other purpose except for municipal water supply shall be hereafter constructed in Hamilton or Herkimer Counties on the south branch of the Moose River by any river regulating board.*[1]

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[1] Entire sentence new matter added.

Said board, on behalf of such district, subject to the limitations of this article, shall have a dominant right of eminent domain over the right of eminent domain of public corporations, except cities. In the exercise of this right, due care shall be taken to do no unnecessary damage to other public utilities, and in case of failure to agree upon the mode and terms of interference, not to interfere with their operation and usefulness beyond the actual necessities of the case, due regard being paid to the other public interest involved.

§2. This act shall take effect immediately.

Order of the Court of Appeals Appealed From.

STATE OF NEW YORK, IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the thirteenth day of October, A. D. 1955.

Present, Hon. Albert Conway, Chief Judge, presiding.

The Board of the Black River Regulating District,

Appellant,

vs.

Adirondack League Club,

Respondent.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and after having heard Charles H. Tuttle, Esq., in support of said motion, Daniel Scanlon, Esq., in opposition thereto and Richard H. Shepp, Esq., having also appeared on behalf of the Attorney General of the State of New York, and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and appeal dismissed, with costs and ten dollars costs of motion.

A copy

(Seal)

GEARON KIMBALL
Deputy Clerk

State of New York,
Jefferson County Clerk's Office, ss:

I, FRED H. MOORE, County Clerk of the County of Jefferson, and Clerk of the Supreme and County Courts in and for said County the same being Courts of Records, do hereby certify that I have compared the foregoing copy of Order—The Board of the Black River Regulating District vs. Adirondack League Club—hereunto annexed with the original filed October 19, 1955, at 10:17 A. M. in this office, and that the same is a true and correct transcript thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Courts, at the City of Watertown, N. Y., this 20th day of February, 1956.

FRED H. MOORE,
Clerk.

(Seal)

Supplemental Memorandum.

[Same Title.]

Motion by Defendant for Judgment on the Pleadings Pursuant to Rule 112 of Rules of Civil Practice or in the Alternative for Summary Judgment Under Rule 113 of Rules of Civil Practice.

Appearances:

Supplemental Memorandum.

Bastow, J.:

Upon the settlement of the order to be entered upon the court's decision of March 24, 1952, a question has been raised as to the scope of that decision. To clarify the matter, the court has not passed upon or decided the questions as to the alleged unconstitutionality of the Stokes Act (Laws 1950, chapter 803) attempted to be raised by the complaint of the plaintiff.

April 12, 1952.

Opinion of Appellate Division, Fourth Department, Dated May 27, 1953 (McCurn, J.).

(282 App. Div. 161.)

SUPREME COURT,

APPELLATE DIVISION—FOURTH DEPARTMENT.

BLACK RIVER REGULATING DISTRICT and WILLIAM R. ADAMS, HENRY E. SMITH and ALFRED H. STILES, Jr., individually and as the Board of Black River Regulating District,

Plaintiffs-Appellants,

vs.

ADIRONDACK LEAGUE CLUB,

Defendant-Respondent.

68/220

Argued March 11, 1953
Decided May 27, 1953

Present—HON. MARSH N. TAYLOR,
Presiding Justice.
" FRANCIS D. McCURN,
" RAYMOND C. VAUGHAN,
" R. FOSTER PIPER,
" JOHN C. WHEELER,
Associate Justices.

APPEAL from Judgment and Order of Jefferson Special Term, Bastow, J., dismissing plaintiffs' complaint and the supplement to the complaint, with costs. The Order appealed from granted defendant's motion to dismiss.

Opinion of Appellate Division, Fourth Department, Dated May 27, 1953 (McCurn, J.)

Judgment entered June 10, 1952.

Appearances:

Daniel Scanlon and Russell Wright (Daniel Scanlon, of Counsel), Attorneys for Plaintiffs-Appellants, 408 National Bank Bldg., Watertown, N. Y.

Breed, Abbott & Morgan (Charles H. Tuttle, of Counsel), Attorneys for Defendant-Respondent, 15 Broad Street, New York, N. Y.

Opinion

McCurn, J.:

This is an appeal from an order at Special Term dismissing the complaint in an action for declaratory judgment and from a summary judgment entered thereon in favor of the defendant.

The New York State Constitution prior to 1913 provided that the Forest Preserve shall forever be kept as wild forest lands and shall not be leased, sold, or exchanged or taken by any corporation, public or private, nor any timber thereon sold, removed or destroyed. A 1913 amendment to the Constitution provided that the Legislature might by general laws provide for the use of not exceeding 3% of such lands for the construction and maintenance of reservoirs for municipal water supply, for the canals of the State, and to regulate the flow of streams. Such amendment further provided that such reservoirs should be constructed and controlled by the State, and the expenses thereof apportioned on the public and private property and

municipalities benefitted, to the extent of the benefit received. Following such 1913 amendment the Legislature enacted a chapter of the Conservation Law entitled: "River Regulation By Storage Reservoirs," that act now being article VII of the Conservation Law. It provided for the creation of River Regulating Districts in part II thereof and in part V established the procedure for construction of reservoirs.

The plaintiff Regulating District was created in 1919 as a public corporation pursuant to the Conservation Law. By April of 1920 it had prepared a plan for the regulation of the Black River and its tributaries which plan had been approved by the Conservation Commission. The plan included construction of the Stillwater Reservoir on Beaver River and the Panther Mountain Reservoir on Moose River. The Stillwater Reservoir has been completed and is in operation. After the preliminary plans and hearings as required by law the plaintiff Board on November 23, 1948 made its final order to construct the Panther Mountain Reservoir pursuant to its plan approved by the Conservation Commission. The plan for the construction of the Panther Mountain Reservoir requires the use of approximately 1,500 acres of the Adirondack Forest Preserve owned by the State and about 3,500 acres of land belonging to the Adirondack League Club, the defendant herein.

Section 454 of the Conservation Law provides that any party affected by the final determination of the Board may review such final determination by certiorari. The League Club, and

certain other organizations whose interests were alleged to have been affected by the order, petitioned for such a review. The proceeding was transferred to this court and determination of the Board confirmed (see *Adirondack League Club v. Black River Regulating District,* 275 App. Div. 618). The League Club appealed to the Court of Appeals. While the appeal was pending and prior to the argument thereof, the Legislature enacted, and on April 20, 1950 the Governor signed, the so-called Stokes Act (L. 1950, Ch. 803) amending section 445 of the Conservation Law by inserting therein the following:

> "No reservoirs for the regulation of the flow of streams or for any other purpose except for municipal water supply shall be hereafter constructed in Hamilton or Herkimer counties on the south branch of the Moose River by any river regulating board."

The appeal came on to be heard in the Court of Appeals on May 26, 1950. That court decided that the action of the Legislature in passing the so-called Stokes Act effectively and completely disposed of the Board's plan, and that the questions raised upon the appeal had thereby become moot (*Matter of Adirondack League Club v. Black River Regulating District,* 301 N. Y. 219). It directed that "the orders should be reversed, without costs and the proceedings remitted to Special Term with directions to dismiss the petitions solely upon the ground that the issues are moot." A final order making the order and

judgment of the Court of Appeals the order and judgment of the Supreme Court and dismissing the proceedings was thereafter made at Special Term. The plaintiffs thereafter brought this action for a declaratory judgment.

The complaint alleges among other things the preparation and approval of the plan and the final order thereon; that the plaintiff Board made extensive investigations, surveys, maps and studies for the construction of the Panther Mountain Reservoir from 1920 down to 1950; that prior to the date of the enactment of the Stokes Act it had expended approximately a quarter of a million dollars for such investigations, surveys and public hearings as necessary preliminaries for the construction of Panther Mountain Reservoir; that the Board had so far proceeded with the construction of the reservoir as to entitle it to complete such work for the benefit of the district and those within such district subject to assessment for the works of the district. It is further alleged:

> "15. That there are now outstanding the duly issued obligations and certificates of indebtedness of plaintiff Board in an amount of over Two Hundred Thousand Dollars which are due and payable on September 1, 1951, and which represent debts duly incurred by the plaintiff District for preliminary work done in connection with construction of Panther Mountain Reservoir prior to April 20, 1950.
>
> 16. That the debt referred to in the preceding paragraph was and is intended

to be paid by plaintiff Board out of the proceeds of the sale of bonds of the District to be issued for construction of Panther Mountain Reservoir in accordance with the Official Plan of the Board, and that such debt was duly incurred on this basis prior to April 20, 1950.

* * * * *

20. The defendant asserts that this amendment bars the construction of Panther Mountain Reservoir.

21. That plaintiffs assert that such amendment is not effective to prevent the completion of Panther Mountain Reservoir, and that such amendment would be and is unconstitutional and void under the Constitutions of the United States and of the State of New York, if construed as preventing the completion of Panther Mountain Reservoir."

The complaint further alleges that plaintiff Board is commencing a condemnation proceeding against the League Club to acquire title for the State of New York of the lands of the defendant required for the construction and maintenance of the reservoir. The complaint demands judgment determining and declaring the rights of the parties and particularly determining and declaring:

"1. That the Board of Black River Regulating District is entitled to maintain condemnation proceedings against Adi-

rondack League Club to acquire lands owned by it and necessary for construction of Panther Mountain Reservoir.

"2. That Chapter 803 of the Laws of 1950 is invalid and unconstitutional so far as it may seem to restrict or prevent the Board of Black River Regulating District from proceeding with and completing the work of construction of Panther Mountain Reservoir."

There is precedent for an action seeking a declaratory judgment to settle disputed claims in connection with a condemnation proceeding (see *Syracuse Grade Crossing Comm. v. D., L. & W. R. R. Co.*, 197 Misc. 192, modified on other grounds, 263 App. Div. 930, affd. 290 N. Y. 632; *Harrison v. N. Y. C. R. R. Co.*, 255 App. Div. 183, affd. 281 N. Y. 653).

The answer denies all of the material allegations of the complaint. For a first and separate defense it alleges in substance that the plaintiffs are without authority to construct and effectively barred from proceeding with the construction of the proposed dam by reason of the enactment of the Stokes Act. For a second affirmative defense it alleges in substance that as a result of the decision of the Court of Appeals the final order and plan of the plaintiffs are no longer in existence and that the plaintiffs have no standing to bring this action. For a third affirmative defense the defendant alleges that the plaintiff Regulating District is a public corporation and has no standing in law to question the constitutional power of the Legislature to adopt the Stokes Act.

Opinion of Appellate Division, Fourth Department, Dated May 27, 1953 (McCurn, J.)

The plaintiffs served a supplement to their complaint setting forth that the plaintiffs had issued and had outstanding certificates of indebtedness in the principal sum of $203,000 issued pursuant to law to obtain funds for necessary preliminary expenses for the construction of the reservoir in question; that said certificates had been presented for payment and payment refused; that the plaintiffs have insufficient moneys in their general fund to permit payment of such certificates and have no other means of paying the same except through completion of the Panther Mountain Reservoir, and the issuance and sale of bonds to cover the cost, including the preliminary expenses thereof. They further allege that the so-called Stokes Act is void as impairing the obligation of contract under such certificates and depriving the plaintiffs of their ability to fulfill their contract obligations under such certificates of indebtedness.

The defendant's answer to the supplement to the complaint is in effect a general denial and a statement to the effect that the allegations contained therein are irrelevant.

The defendant brought on a motion for an order granting judgment on the pleadings in favor of the defendant under rule 112 of the Rules of Civil Practice on the ground that the plaintiffs are barred from the relief demanded in the complaint by the Stokes Act and the decision of the Court of Appeals; and upon the further ground that the plaintiffs are without power or authority to question the constitutional power of the Legislature; and upon the further ground that the Legislature and the Court

of Appeals have effectively and completely disposed of the plaintiffs' plan. The notice of motion also states that the defendant will at the same time and place move under rule 113 of the Rules of Civil Practice for an order dismissing the complaint and for summary judgment. In support of the motion under rule 113 an affidavit was filed incorporating the remittiture of the Court of Appeals in the motion papers. There were also heard at the same time motions on behalf of Miss Madeleine Bagley, holder of a certificate of indebtedness and the City of Watertown to intervene as plaintiffs in the action. The Special Term granted the motion for summary judgment on the theory that as stated in the Court of Appeals decision "since no construction had actually been commenced, the action on the part of the Legislature effectively and completely disposed of the Board's plan." The Special Term concluded that if there was no longer any plan in existence, and since the Court of Appeals had stated that there was none, then there was no basis upon which the plaintiffs could proceed to condemn the defendant's lands. Having reached that conclusion the Court found it unnecessary to pass upon the other grounds urged by the defendant. The motions by the City of Watertown and by Miss Bagley to be allowed to intervene were dismissed as academic, and they have not appealed.

While the judgment of the Court of Appeals directed only that the judgment of the Appellate Division be reversed and the certiorari proceeding dismissed, and technically, at least, left

standing the order of the Board, nevertheless it apparently rendered the order inoperative and it was, as the Special Term has stated, annulled or done away with by implication of law. The Court of Appeals did not pass upon the constitutionality of the Stokes Act. If that act should now be declared unconstitutional or otherwise invalid, such invalidity would date from the time of its enactment and there would be no longer any basis on which to rest the decision of the Court of Appeals. Since it was the Stokes Act which destroyed plaintiffs' order the fact that they now have no order should not also destroy their right to test the validity of the act that destroyed the order. The opinion at Special Term indicates that the decision there was reached, in part at least, for the reason that if the Board's order is still in existence, or if it can be revived by invalidating the Stokes Act, then the defendant would lose its right to review the order by certiorari pursuant to section 454 of the Conservation Law. We do not believe that such a result would follow. If it should be declared that the Stokes Act is unconstitutional, we see no reason why defendant would be deprived of its right to complete its certiorari under section 454. In such a situation the issues which were rendered moot by passage of the Stokes Act would be no longer moot. The defendant could, as we view it, make application to the Court of Appeals for a re-argument on the merits of the appeal taken from the confirmation by this court of the determination.

We turn now to the defendant's contention that the plaintiff Regulation District as a public

corporation is an agency of the State created to perform state functions and is without power to question the validity of the acts of the Legislature. There is an abundance of authority that such is the general rule. We have already held that the plaintiff is a State agency; that the members of the Board of the District are State officers, and that their acts are acts of the State (*Matter of Adirondack League v. Black River Regulating District*, 275 App. Div. 618, 626). (See also *Breen v. Mortgage Commission*, 285 N. Y. 425, 430; *Gaynor v. Marohn*, 268 N. Y. 417, 425.) Most of the cases cited in the briefs upon this point involve municipal corporations, but the well established rule that the power of the Legislature is supreme and not subject to being questioned by State agencies must apply to public corporations, like the plaintiff, as well as to municipalities. In fact the term "public corporation" as defined by General Corporation Law, section 2, includes both municipal corporations and district corporations. It is generally held that "being but creatures of the State municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment to the Constitution in opposition to the will of their creator' (*Coleman v. Miller*, 307 U. S. 433, 441; *Trenton v. New Jersey*, 262 U. S. 182; see also *County of Albany v. Hooker*, 204 N. Y. 1).

The status of the plaintiffs here, however, and their ability to test the validity of an act of the Legislature should not be determined entirely by the general rules mentioned in the decisions cited. Here, according to the complaint, acting

under statutory authority plaintiffs have proceeded to perfect the plan and make a final order and in so doing have incurred an indebtedness represented by over two hundred thousand dollars worth of certificates of indebtedness. According to the complaint the plaintiffs will be unable to meet these contract obligations with the certificate holders except from the proceeds of a bond issue and bonds may not be issued if the project is halted at this juncture. Thus plaintiffs, acting under statute, have incurred independent obligations and now allege that the action of the Legislature has rendered them helpless to meet their contractual obligations.

Legislation revoking the taxing powers of a municipality or state agency may be invalid as impairing the obligation of contract in some situations. "It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given thus becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of contract in this way than in any other" (*Von Hoffman v. City of Quincy*, 4 Wall. 535, 554).

Allen, J., writing in *People v. Ingersoll*, 58 N. Y. 1, 33, took occasion to discuss this ques-

tion as regards an issue of county bonds as follows:

> "If valid, they are the obligations of the county of New York, and the debt a county charge. The State is under no obligation to pay the bonds or to provide for their payment, except so far as a sovereign State is bound to act in good faith toward those who have acted and parted with their money on the faith of its laws and policy. The State cannot, in good morals, do anything to impair or diminish the ability of the county to pay the bonds at maturity. The only security the debtor has is the credit of the county, and the grant of power to the county with direction in the act to levy taxes for the payment of the debt. To this extent, the State may, perhaps, be regarded as contracting with those who have taken the bonds, and to have agreed that this grant of power shall not be revoked; but this does not create an obligation to pay the bonds. It only brings the transaction within the provision of the Constitution of the United States prohibiting States from passing any bill 'impairing the obligations of contracts' (Constitution of the United States, art. 1 §10), and makes the grant of power irrevocable."

(see also *Nelson v. St. Martin's Parish*, 111 U. S. 716, 721; *Trustees of the Wabash & Erie Canal Co. v. Beers*, 2 Black 448; *Seibert v. Lewis*, 122 U. S. 284; *Curran v. State of Ar-*

kansas, 15 How. 304; *Board of Education v. Board of Education*, 76 App. Div. 355, 360, affd. 179 N. Y. 556).

The complaint alleges in effect that the plaintiffs have no way of meeting their contractual obligations under the certificates of indebtedness except by issuance of bonds which in turn would be retired from the proceeds of taxes levied on the properties benefitted from the project.

While the plaintiff Regulating District constitutes a State agency for carrying out sovereign powers of the State, still it would seem to act in its own corporate capacity as a principal and not as an agent of the State in the matter of issuing of certificates of indebtedness; it does not appear that the State has pledged its credit for the payment of such indebtedness (see discussion *Peo. v. Ingersoll*, 58 N. Y. 1, at p. 30). It follows that since the Stokes Act has effectively cancelled the power of the plaintiffs to issue bonds and levy taxes on the property which would have been improved by this particular project, and since the plaintiffs are and will remain liable on the certificates of indebtedness, that the plaintiffs have an independent interest separate and apart from their status as agents of the State to test the validity of the Stokes Act. The removal of the plaintiffs' power to issue bonds and levy taxes with which to retire these certificates of indebtedness gives to the plaintiffs such an independent interest as to entitle them to test the validity of the act of the Legislature. Therein lies the distinction between this case and *Albany v. Hooker*, 204 N. Y. 1. Even the State itself may in a proper case as-

sert the unconstitutionality of the acts of its legislature (*First Construction Co. v. State of N. Y.*, 221 N. Y. 295, 310).

The State, however, is not a party and because of its immunity may not be made a party. The controversy set forth in the complaint is between the plaintiffs and the defendant League Club. The plaintiffs allege that they are commencing a proceeding in condemnation to acquire certain lands of the defendant as are required for the construction and maintenance of the proposed reservoir. The defendant League Club asserts that the Stokes Act has intervened to revoke plaintiffs' power to construct the reservoir and that consequently plaintiffs are now without power to condemn the league Club's property.

The defendant League Club takes the position that the State is an indispensable party, and since it cannot be made a party because of its immunity, the Court lacks jurisdiction of the subject matter of the controversy, relying largely upon what was said in the opinion in *Niagara Falls Power Company v. White*, 292 N. Y. 472. In that case the controversy arose out of conflicting claims between the plaintiff and the State as to which owned certain water rights in the Niagara River. Obviously that question could not be settled in the absence of one of the conflicting claimants. The controversy here is of an entirely different nature. The controversy here involves the right of the plaintiffs to condemn some 3500 acres of land belonging to the defendant League Club. The State has no interest at all in such lands. The State's interest extends only to the 1500 acres of State

land upon which it is proposed to build the dam, and in that land the League Club has no interest. The interest of the defendant in preventing condemnation of its land and the interest of the State in forbidding the erection of the dam upon its lands involve separate rights and interests in separate properties, and are in no way joint interests. The fact that both are relying upon the validity of the Stokes Act in asserting their respective claims does not change that situation. It has never been necessary in order to test the validity of a statute to join as parties all those who have, or may have, separate interests in establishing the validity or the invalidity of such a statute.

Whether or not the Court will take jurisdiction in an action for declaratory judgment is a matter for the Court's discretion (Rule 212, Rules of Civil Practice). Such discretion so far as parties are concerned is subject to sections 192 and 193 of the Civil Practice Act (See Rule 210, Rules of Civil Practice). Section 193 of the Civil Practice Act provides in part:

> "1. A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispensable party. A person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party.

> "2. When it appears that an indispensable party has not been joined, the court shall order such party brought in. * * * When it appears that a conditionally necessary party has not been joined, the court shall order such party to be brought in if he is subject to the jurisdiction of the court and can be brought in without undue delay. The court in its discretion may proceed in the action without a conditionally necessary party if his addition would cause undue delay or if jurisdiction can be acquired over him only by his consent or voluntary appearance * * *."

We conclude that the State is a conditionally necessary party and not an indispensable party within the purview of section 193 of the Civil Practice Act.

It is readily apparent that if the plaintiffs are precluded from proceeding in this action because of the absence of the State as a party, they may be left without recourse to the courts to test the validity of the statute in question. Such a result should be avoided if possible. If we are correct in our view that the State is only a conditionally necessary party, then the Court may and in the exercise of its discretion should take jurisdiction of the action notwithstanding the absence of the State (see Twelfth Annual Report Judicial Council, pp. 173 *et seq.; Bourdieu v. Pacific Oil Co.*, 299 U. S. 65, 70).

In the circumstances here, we are unable to see how any prejudice may result to the in-

terests of the State. The pleadings before us indicate quite clearly that the facts and circumstances pertinent to a construction as to the validity of the statute are all a matter of record. There is no indication in the brief of the Attorney General that the State will make any other or different claim as to the facts. The declaration sought here presents a question of law. While it is true that any judgment rendered will not be *res adjudicata* as to the State and theoretically, at least, there will be the possibility of further litigation to determine the State's rights, such a prospect appears unlikely and would in any event be less undesirable than to leave the plaintiffs without a remedy. The Attorney General is already present in the action pursuant to section 71 of the Executive Law. He appeared upon the oral argument of this case and filed an excellent brief presenting in detail every possible argument in favor of the interests of the State. We are unable to see where any prejudice may result by reason of the absence of the State as a party. We conclude that the Court should take jurisdiction of the action notwithstanding the absence of the State.

We have also considered the status of the owners of the certificates of indebtedness and have reached the conclusion that they also are conditionally necessary parties, and that such of them as are within the jurisdiction of the Court should also be brought in as parties to the action.

The judgment and order appealed from should be reversed with costs and the motion should be denied with $10.00 costs.

Opinion of the Court of Appeals.

(307 N. Y. 475.)

July 14, 1954

DYE, Judge:

In this appeal we deal with the enforcibility of a proposed plan to construct Panther Mountain Reservoir and Dam on the south branch of the Moose River, a tributary of the Black River in Herkimer County, for the purpose of regulating the flow of the Black River and its tributaries.[1]

The controversy turns on the applicability of the Stokes Act, so-called, which prohibits the construction of "reservoirs for the regulation of the flow of streams or for any other purpose EXCEPT FOR municipal water supply * * * in Hamilton or Herkimer counties on the south branch of the Moose River by any river regulating board." L. 1950, ch. 803, eff. April 20, 1950, amending Conservation Law, Consol. Laws, c. 65, §445, as added by L. 1915, ch. 662.

Prior to such amendment the State Constitution as it then read, declared "lands of the state * * * constituting the forest preserve * * * shall be forever kept as wild forest lands" subject however to the exception that the Legislature could provide "for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs * * * to regulate the flow of streams." N. Y. Const., Art. XIV, §§1, 2.

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[1] Note: According to the pleadings the proposed plan was approved by the Conservation Commission, April 30, 1920, and embraced among other properties the enlargement of the Stillwater Reservoir on Beaver River completed in 1923, an integral part of which was the Panther Mountain regulating reservoir. In furtherance of such plan the board made extensive investigations, surveys, maps, plans and studies including engineering and legal costs and other necessary preliminaries for its construction in accordance with law, all of which were approved after the required public hearing, and the final order filed in each of the required County Clerk's offices on or about November 23, 1948.

At the general election held in November, 1953, this exception was cancelled and withdrawn by the adoption of the Ostrander Amendment, so-called, which, according to the official phrasing prepared by the Secretary of State for the voting machines and ballots was intended "to prohibit the use of portions of the forest preserve for the construction of reservoirs to regulate the flow of streams." In adopting that amendment the People of the State have rendered the lands of the State Forest Preserve inviolate for use in regulating the flow of streams.

When the parties to this litigation were previously before us, the board asked us to review the correctness of the decision in the Appellate Division (to the effect that the reservoirs and dam should be built according to plan "to the same extent that it would have done if the Stokes Act had not been passed"). We ruled that "Since the reservoir planned by the Board * * * was concededly not 'for municipal water supply' and since no construction had actually been commenced, the action on the part of the Legislature [that is, enactment of the Stokes Act] effectively and completely disposed of the Board's plan." We reversed the order of the Appellate Division and remitted the matter to Special Term "with directions to dismiss the petitions solely upon the ground that the issues are moot." 301 N. Y. 219, 93 N. E. 2d 647, 648, 649. We thus did not reach the merits, *Wilmerding v. O'Dwyer*, 297 N. Y. 664, 76 N. E. 2d 325, nor did we deem it a situation requiring special treatment. *Rosenbluth v. Finkelstein*, 300 N. Y. 402, 91 N. E. 2d 581; *Glenram Wine & Liquor Corp. v. O'Connell*, 295 N. Y. 336, 67 N. E. 2d 570. At the same time we declined to pass upon the constitutionality of the Stokes Act as such question was not then before us. *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N. Y. 219, 93 N. E. 2d 647, reversing 275 App. Div. 618, 92 N.

Y. S. 2d 256. Shortly thereafter the Black River Regulating District and the individual plaintiffs for themselves and as member of the district board instituted this action for a judgment declaring it entitled to maintain condemnation proceedings[2] as against the defendant, Adirondack League Club, and that the Stokes Act in its application to the Panther Mountain Reservoir project is constitutionally invalid.

The defendant, Adirondack League Club, by its answer, admitted all the facts of record and generally denied all other allegations, pleading in and for an affirmative defense that the construction of the Panther Mountain Reservoir was barred by the Stokes Act, the plaintiff's lack of status to challenge its validity and our decision in the prior case. The defendant then challenged the sufficiency of the complaint by motion for judgment on the pleadings, Rules Civ. Prac., Rule 112, or, in the alternative for an order dismissing the complaint and for summary judgment, Rules Civ. Prac., Rule 113. The Special Term granted such motion, dismissed the complaint and gave summary judgment in favor of the defendant.

The Appellate Division, although agreeing that the final order of the district board had been rendered inoperative by the decision of this Court, and had been annulled by implication of law, but since we had not passed on the constitutionality of the Stokes Act, unanimously reversed on the law and the facts the Special Term order dismissing the complaint, holding as a matter of law if the constitutional invalidity of the act was established, "the issues which were rendered moot by passage of the Stokes Act would be no longer moot." The Appellate Division, also indicated that the plaintiffs had an inde-

[2] Note: Approximately 3,500 acres of land belonging to the Adirondack League Club and 1,500 acres of State-owned land—parts of the Forest Preserve—will be needed for the project.

pendent interest (by reason of their liability on the outstanding certificates of indebtedness), separate and apart from their status as an agency of the State, to test the constitutionality of the Stokes Act. *Black River Regulating Dist. v. Adirondack League Club*, 282 App. Div. 161, 121 N. Y. S. 2d 893, 900.

The Appellate Division granted leave to appeal to this Court on seven certified questions of law, viz:

"1. Did this Court err as a matter of law in reversing the order and judgment of the Special Term?

"2. Under Rule 112 of the Rules of Civil Practice was the defendant entitled, as a matter of law, to judgment on the pleadings dismissing the complaint?

"3. In the alternative, and under Rule 113, of the Rules of Civil Practice, was the defendant entitled, as a matter of law to judgment dismissing the complaint?

"4. Were the plaintiffs, as a matter of law, without power or standing to question the constitutional power of the State Legislature to adopt the so-called Stokes Act, being Chapter 803 of the Laws of 1950?

"5. Was the Supreme Court, as a matter of law, without jurisdiction over the subject matter of this action in that the State of New York is not, has not been, and has not consented to become, a party to the action?

"6. Is the State of New York a necessary and indispensable party to this action as a matter of Law?

"7. Is the plaintiff District and Board without power, as a matter of law, to sue in this action by a private attorney for a declaratory judgment that Chapter 803 of the Laws of 1950 is unconstitutional?"

[1] At the outset we wish to make it clear that we intend to deal with the issues presented in light of existing law. While the Stokes Act and the Ostrander Amendment were subsequent to the approval of the proposed reservoir project, they none-the-less ennunciated a public policy concerning the use of the lands in the State Forest Preserve in order to make sure that such lands shall be "forever kept as wild forest lands." In such a setting we decide the issue and answer the questions certified in accordance with the law as it exists when our decision is made, *Gallewski v. H. Hentz & Co.*, 301 N. Y. 164, 172, 93 N. E. 2d 620, 623; *Boardwalk & Seashore Corp. v. Murdock*, 286 N. Y. 494, 36 N. E. 2d 678; *Robinson v. Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 579, 36 A. L. R. 1310, a policy in harmony with Federal authority, *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49, and which is consonant with our unwillingness to perpetuate a judgment contrary to existing law. *Tartaglia v. McLaughlin*, 297 N. Y. 419, 79 N. E. 2d 809; *Matter of Kahn (National City Bank)*, 284 N. Y. 515, 32 N. E. 2d 534; *Bradford v. Suffolk County*, 283 N. Y. 503, 28 N. E. 2d 932; *Texas Co. v. Brown*, 258 U. S. 466, 42 S. Ct. 375, 66 L. Ed. 721; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349.

The constitutional withdrawal of the board's legislative authority to use lands of the State Forest Preserve "to regulate the flow of streams" is not in any way limited to a prospective effect, nor may its effectiveness be suspended or postponed by the plaintiffs' claim of a so-called vested right to proceed to construction, because of prior approval of its official plan.

That plan, as we have heretofore said, was completely and effectively disposed of by the enactment of the Stokes Act. *Adirondack League Club v. Board of Black River Regulating Dist.*, 301 N. Y. 219, 222, 93 N. E. 2d 647, 648.

[2] Regulation of the flow of streams by the construction and maintenance of reservoirs is a matter of State concern in the interest of public health, safety and welfare. Conservation Law, Art. VII; *Board of Black River Regulating Dist. v. Ogsbury*, 203 App. Div. 43, 196 N. Y. S. 281, affirmed 235 N. Y. 600, 139 N. E. 751; *Board of Hudson River Regulating Dist. v. Fonda, Johnstown & Gloversville R. R. Co.*, 249 N. Y. 445, 164 N. E. 541.

[3] A regulating district charged with the authority to carry out the public purpose is an agency of the State depending for its existence and performing its functions subject to the control and direction of the State. The number and nature of its powers are within the State's absolute discretion and any alteration, impairment or destruction of those powers by the Legislature presents no question of constitutionality.

[4] It has long been settled by Federal decisions that that such powers are not protected by the due process clause of the Fourteenth Amendment to the Federal Constitution. *Hunter v. City of Pittsburgh*, 207 U. S. 161, 177-179, 28 S. Ct. 40, 52 L. Ed. 151; *City of Trenton v. State of New Jersey*, 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *Faitoute Iron and Steel Co., v. City of Asbury Park*, N. J., 316 U. S. 502, 62 S. Ct. 1129, 86 L. Ed. 1629; *Williams v. Mayor and City Council of Baltimore, Md.*, 289 U. S. 36, 53 S. Ct. 431, 77 L. Ed. 1015; *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 397-399, 39 S. Ct. 526, 63 L. Ed. 1054; *City of New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943; *Essex Public Road Bd. v. Skinkle*, 140 U. S. 334, 11 S. Ct. 790, 35 L. Ed. 446; *Brooklyn & Richmond Ferry Co. v. United States*, 2 Cir. 167 F. 2d 330, 333.

[5] The Courts of this State from very early times have consistently applied the Federal rule in holding that political power conferred by the Legislature confers no vested right as against the government itself. It is on the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee, but for the common good. How long it shall exist or how it may be modified or altered belongs exclusively to the people to determine. *People v. Morris*, 13 Wend. 325, 331-332. The concept of the supreme power of the Legislature over its creatures has been respected and followed in many decisions. *City of Rochester v. Public Service Comm.*, 192 Misc. 33, 83 N. Y. S. 2d 436, affirmed 275 App. Div. 172, 89 N. Y. S. 2d 545, affirmed 301, N. Y. 801, 96 N. E. 2d 192; *City of New York v. Village of Lawrence*, 250 N. Y. 429, 437, 165 N. E. 836, 838; *People v. Pinckney*, 32 N. Y. 377, 395; *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164; *Crenshaw v. United States*, 134 U. S. 99, 107, 10 S. Ct. 431, 33 L. Ed. 825; *Williamson v. State of New Jersey*, 130 U. S. 189, 200, 9 S. Ct. 453, 32 L. Ed. 915; *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. Ed. 197; *County of Albany v. Hooker*, 204 N. Y. 1, 97 N. E. 403.

[6] The contention that the district board is more than an agency of the State because voluntarily formed must be rejected. The district is voluntary in nature only to the extent that a person or public corporation may petition the water power and control commission for its organization, Conservation Law, §432. However, it is the order of the commission which creates the district, Conservation Law, §434, for the sole State purpose of constructing reservoirs for river regulation. In fulfilling its purpose, the district exercises only governmental functions in accordance with the mandate of Section 2 of Article XIV of the State Constitution that the reservoirs

shall be constructed, owned, controlled and operated by the State.

[7-11] The inclusion of Panther Mountain Reservoir in the official plan did not vest in petitioners *per se* a contractual interest, either in the proposed site or in the construction of a reservoir, which could not be impaired by legislative action. Statutory provisions for public hearings at which objections may be raised, Conservation Law, §453, and for judicial review of any determination made thereon, Conservation Law, §454, preclude any concept of necessity or inevitability with respect to the ultimate construction of the reservoir. Inherent in the grant of legislative power is the plenary power to alter or revoke. The law altering or revoking does not impair any obligation of contract. *Board of Education of Union Free School, Dist. No. 6 v. Board of Education of Union Free School Dist. No. 7*, 76 App. Div. 355, 78 N. Y. S. 522, affirmed without opinion 179 N. Y. 556, 71 N. E. 1128. Actually there is only one party to a contract by which a governmental corporation is formed. Its board of directors are only trustees for the common good. *City of New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943, *supra*. The interests of the plaintiffs then are only those of the State and the State cannot challenge its own acts. *Sweeney v. State of New York*, 251 N. Y. 417, 167 N. E. 519.

As we have pointed out, the district board has no special character different from that of the State. Its only purpose is to construct reservoirs, and that, concededly, is a State purpose in the interest of public health, safety, and welfare, Conservation Law, §431. Not only as a board, but also as individuals, the plaintiffs are without power to challenge the validity of the act or the Constitution. *Bull v. Stichman*, 273 App. Div. 311, 78 N. Y. S. 2d 279, affirmed 298 N. Y. 516, 80 N. E. 2d 661.

[12, 13] The issuance of certificates of indebtedness does not confer upon plaintiffs an independent status by which they have standing, either as a body politic or as individuals, to test the validity of the Stokes Act. *Bull v. Stichman*, 273 App. Div. 311, 78 N. Y. S. 2d 279, affirmed 298 N. Y. 516, 80 N. E. 2d 661, *supra*, or to protect the interest of creditors of the district. *Board of Education of Union Free School Dist. No. 1, of the Towns of Bethlehem, Coeymans and New Scotland v. Wilson*, 303 N. Y. 107, 115, 100 N. E. 2d 159, 163, *Board of Education of Union Free School Dist. No. 6 v. Board of Education of Union Free School Dist. No. 7*, 76 App. Div. 355, 78 N. Y. S. 522, affirmed 179 N. Y. 556, 71 N. E. 1128, *supra*. Whatever contract the certificate holders may have with the district is subject to legitimate governmental power exercised on behalf of the public welfare. *Norman v. Baltimore & O. R. Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885; *Stephenson v. Binford*, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288; *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152; *Board of Education of Union Free School Dist. No. 6 v. Board of Education of Union Free School Dist. No. 7, supra.*

The plaintiffs, either as a body politic or as individuals, are effectively barred from maintaining condemnation proceedings and have no standing in law either to challenge the applicability of the Stokes Act or the Ostrander amendment. Having reached the conclusion that the Stokes Act is constitutional and that the plaintiffs lack status to challenge its validity, we see no necessity for passing on any other question.

The order of Appellate Division should be reversed, with costs, and the matter remitted for further proceed-

ings in accordance with the opinion herein. The first, third and fourth questions certified are answered in the affirmative. The second, fifth, sixth and seventh questions certified are not answered.

Lewis, C. J., and Conway, Desmond, Fuld, Froessel and Van Voorhis, JJ., concur.

Order reversed, etc.

Memorandum Decision by Court of Appeals.

(309 N. Y. 798, Advance Sheet No. 867 of December 10, 1955.)

APPEAL, on alleged constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 5, 1955, unanimously affirming a judgment of the Supreme Court in favor of defendant, entered in Jefferson County upon an order made at a Special Term of the Supreme Court held in Oneida County (Kingsley, J.), granting a motion by defendant for an order dismissing the proceeding with prejudice. MOTION by respondent to dismiss the appeal on the ground, among others, that no constitutional question is involved. CROSS MOTION by appellant to postpone argument of the appeal.

* * * * * (Attorneys' Appearances)

Motion to dismiss appeal granted and appeal dismissed, with costs and $10 costs of motion.

Motion for adjournment of argument dismissed.

MAR 30 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,
Appellant,

v.

ADIRONDACK LEAGUE CLUB,
Defendant-Appellee.

APPELLEE'S MOTION AND BRIEF FOR DISMISSAL

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SUBJECT INDEX

PAGE

Appellee's Motion to Dismiss 1

I. Reasons for Dismissal of this Appeal 3

II. Summary of Reasons for Dismissal 12

III. The dismissal should, we respectfully submit, be with double costs 13

IV. We respectfully submit that the appeal and the alternative application for a writ of certiorari should be dismissed, with double costs 17

Cases Cited

Ackermann v. United States, 340 U. S. 193 ..... 9, 12
Angel v. Bullington, 330 U. S. 183 ..... 9, 11, 12
Association for the Protection of the Adirondacks v. MacDonald, 253 N. Y. 234 14

Baldwin v. State Traveling Men's Association, 283 U. S. 522 11
Bonner v. Gorman, 213 U. S. 86 11
Bull v. Stitchman, 273 App. Div. 311, aff'd 298 N. Y. 516 ..... 7, 8

Crenshaw v. United States, 134 U. S. 99 8

Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512 8

PAGE

Fryberger v. Harris Co., 273 N. Y. 115 11

Matter of Haydorn v. Carroll, 225 N. Y. 84 ..... 6, 11
Herb v. Pitcairn, 324 U. S. 117 6

Matter of Kapf v. DuMond, 298 N. Y. 859 11

Newark v. New Jersey, 262 U. S. 192 8

Trenton v. New Jersey, 262 U. S. 182 8

Williams v. Mayor, 289 U. S. 36 8
Williamson v. New Jersey, 130 U. S. 189 8

Other Authorities

U. S. C., Title 28, Sec. 2103 ..... 13, 16

Stokes Act, L. 1950, ch. 803 ..... 6, 7, 13

New York State Constitution:
Article V, Sec. 3 8
Article VI, Sec. 7 5
Article XIV, Sec. 2 ..... 7, 14

New York Civil Practice Act, Sec. 588 ..... 4, 6, 10, 11

IN THE

Supreme Court of the United States

October Term, 1955

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,
Appellant,

v.

ADIRONDACK LEAGUE CLUB,
Defendant-Appellee.

Appellee's Motion to Dismiss

The defendant-appellee moves under Rule 16 to dismiss the appeal and the alternative petition for certiorari on the following grounds:

(1) The appeal is not within the jurisdiction of this Court.

(2) The determination of the New York Court of Appeals rests on adequate non-federal bases.

(3) The federal questions sought to be reviewed were not before the New York Court of Appeals and were not passed on.

(4) The federal questions sought to be reviewed were not timely or properly raised.

(5) No federal question—certainly no substantial federal question—is presented.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,

Appellant,

v.

ADIRONDACK LEAGUE CLUB,

Defendant-Appellee.

BRIEF IN SUPPORT OF MOTION

I

Reasons for Dismissal of this Appeal

(1) No lawful jurisdiction is invoked. The appellant has never had any right of appeal to this Court; but, even if it ever had, it has long since allowed the time and the occasion to pass.

The Jurisdictional Statement states (pp. 14, 15) that the appeal is from an "order" (elsewhere wrongfully called a "judgment") of the Court of Appeals of the State of New York *dismissing*, on appellee's motion, this appellant's appeal to that Court from a judgment of the Appellate

Division unanimously affirming the Special Term's judgment dismissing this appellant's proceeding for condemnation of the appellee's land for incorporation in the appellant's proposed construction of the so-called Panther Dam and Reservoir in the Adirondacks (309 N. Y. 798).

The Jurisdictional Statement also acknowledges (p. 14) that the judgments of the Appellate Division and the Special Term *were not on constitutional grounds at all but were solely on res judicata.*

To quote the Appellate Division's memorandum, (285 App. Div. 1115) (April 27, 1955):

> "We think the decision in the former action (*Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475), requires us to affirm the judgment dismissing the complaint. In that decision the court said (p. 489): 'The plaintiffs * * * are effectively barred from maintaining condemnation proceedings.' We are bound by that decision. All concur."

No appeal to this Court was ever attempted by this appellant from the aforesaid "decision in the former action" (307 N. Y. 475, July 14, 1954); and its time within which to appeal has long since expired.

The Jurisdictional Statement also acknowledges (p. 15) that this appellant's ensuing appeal to the New York Court of Appeals was expressly taken *solely as a matter of right* under the following section of the New York Civil Practice Act restricting the appellate jurisdiction of that Court:

> "§588. *Appeal as of right.* Appeal to the court of appeals as of right lies *only*
>
> 1. from a judgment or order of the appellate division, provided that the judgment finally determine an

action, or the order finally determine a special proceeding, and provided further that

(a) there be *directly involved* the construction of the constitution of the state or of the United States; * * *." (Emphasis ours.)

Article VI, Section 7, of the State Constitution imposes an identical restriction on the appellate jurisdiction of the Court of Appeals.

Although this appellant's notice of appeal to the Court of Appeals is not embodied in the Jurisdictional Statement, there can be no dispute that its text declared that the appeal was taken "as a matter of right under Section 588, Subdivision 1(a) of the Civil Practice Act". (See Jurisdictional Statement, p. 15.)

The dismissal memorandum of the Court of Appeals (309 N. Y. 798, October 13, 1955) is reproduced on page 56 of the Jurisdictional Statement. It states that the appeal had been taken "on alleged constitutional grounds", that the motion to dismiss was made "on the ground, among others, that no constitutional question is involved"; and that the motion is "granted and appeal dismissed".

The Attorney General of the State filed with the Court of Appeals a "Memorandum in support of respondent's motion for dismissal of appeal", and his appearance is recited in the Court's memorandum of decision (309 N. Y. 798-9). (See also Jurisdictional Statement, p. 25.)

(2) We respectfully submit that, among the reasons for want of jurisdiction in the Supreme Court of the United States, are:

(a) The Supreme Court has no power to force the State Court of Appeals to entertain an appeal deemed

by it to be excluded from its jurisdiction by the State's Constitution and statutes.

(b) The Court of Appeals' settled interpretation that the words "directly involved" in Section 588 of the New York Civil Practice Act mean "*necessarily* involved in the decision of the case" (*Matter of Haydorn* v. *Carroll*, 225 N. Y. 84, 87), is a non-federal matter.

(c) The Court of Appeals' determination that, since the Appellate Division's decision was based on *res judicata*, no constitutional question was "directly involved" by the appeal, presents no federal question.

(d) The effect of that Court's 1954 decision between the same parties (307 N. Y. 475, 906) as *res judicata* and estoppel in the condemnation proceeding, is obvious on its face and presents no federal question. (*Herb* v. *Pitcairn*, 324 U. S. 117, 125.)

(3) The Jurisdictional Statement *admits* (p. 11) that after the decision of the Court of Appeals in 301 N. Y. 219 (1950), rendered between these same parties and adverse to this appellant and to its Panther Dam project, this appellant began in July 1951 two new suits in the New York Supreme Court,—the major suit being for declaratory judgments that the Stokes Act (L. 1950, ch. 803, forbidding the Panther Dam) was unconstitutional and that in consequence the appellant was entitled to maintain the subsidiary and ancillary suit, namely a proceeding to condemn the appellee's land.

The prayer for judgment in the appellant's declaratory judgment action read as follows:

"1. That the Board of Black River Regulating District is entitled to maintain condemnation proceedings

against Adirondack League Club to acquire lands owned by it and necessary for construction of Panther Mountain Reservoir.

2. That Chapter 803 of the Laws of 1950 is invalid and unconstitutional so far as it may seem to restrict or prevent the Board of Black River Regulating District from proceeding with and completing the work of construction of Panther Mountain Reservoir."

The Jurisdictional Statement further *admits* (p. 14) that the ancillary condemnation proceeding was left immobile while the appellant's primary action for declaratory judgments was carried up to the Court of Appeals where a final determination on the merits was rendered against this appellant (307 N. Y. 475, July 14, 1954). That decision by the Court of Appeals in 1954 held, in response to the Appellate Division's certified questions:

(a) "The Stokes Act is constitutional" (pp. 487, 490).

(b) The Ostrander Amendment to the State Constitution ratified by the People during the appeal's pendency, is also constitutional (pp. 484, 486, 489).

(c) "The plaintiffs, either as a body politic or as individuals, * * * have no standing in law either to challenge the applicability of the Stokes Act or the Ostrander Amendment" (p. 489).

(d) "Not only as a board, but also as individuals, the plaintiffs are without power to challenge the validity of the Act or the Constitution. (*Bull* v. *Stichman*, 273 App. Div. 311, affd. 298 N. Y. 516)." (p. 489).

(e) "*The plaintiffs, either as a body politic or as individuals, are effectively barred from maintaining condemnation proceedings*" (p. 489). (Emphasis ours.)

Holdings (c), (d) and (e) obviously had adequate non-federal bases.

A lack of standing on the part of a minor administrative agency of the State to challenge the constitutionality of the acts of the Legislature and the People, does not itself present a federal question. (*Trenton* v. *New Jersey*, 262 U. S. 182; *Newark* v. *New Jersey*, 262 U. S. 192; *Williams* v. *Mayor*, 289 U. S. 36; *Williamson* v. *New Jersey*, 130 U. S. 189, 200; *Crenshaw* v. *United States*, 134 U. S. 99, 107; *Bull* v. *Stichman*, 273 App. Div. 311, aff'd 298 N. Y. 516; *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 521.)

The State has an overriding power to terminate a subordinate body or to forbid exercise of its powers; and the subordinate body cannot seek federal protection for insubordination. Such overriding power is expressly conferred on the Legislature by Article V, Section 3, of the State Constitution.

This appellant thereupon moved in the Court of Appeals for reargument or amendment of the remittitur. The motion was denied (307 N. Y. 906, December 2, 1954).

On the remittitur of the Court of Appeals, final judgment was duly entered on October 27, 1954, by the Supreme Court, Jefferson County, dismissing this appellant's aforesaid action for declaratory judgments. That final judgment conclusively established between these very parties that this appellant was "*effectively barred from maintaining condemnation proceedings*" against the appellee's land.

This appellant had expressly asked in its declaratory action for a judgment on that very issue. In 307 N. Y. 475, 906, it received the authoritative answer,—*an adverse bar.*

(4) Then,—if at all—was this appellant's moment for attempting to appeal to the Supreme Court of the United States.

Had the appellant so attempted, the appellee would, of course, have asked dismissal on the obvious ground that the Court of Appeals' decision had expressly included adequate non-federal bases.

But this appellant let the moment pass; waived its opportunity; and permitted the status of the Court of Appeals' 1954 decision as *res judicata* to become, by lapse of time, *unchallengeable* in this Court or in any other court.

As said in *Ackermann* v. *United States*, 340 U. S. 193, 198:

> "There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from."

And as said in *Angel* v. *Bullington*, 330 U. S. 183, 190:

> "He (the would-be appellant) forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. *He cannot begin all over again in an action involving the same issues before another forum in the same State.*" (Emphasis ours.)

(5) Yet that is precisely what this appellant thereupon attempted,—and this in the very teeth of the principle of *res judicata*.

As the Jurisdictional Statement admits (p. 14), the appellant then sought to revive its dormant ancillary suit, namely, the very condemnation proceeding to maintain

which the appellant had sought a declaratory judgment from the Court of Appeals and had been held barred.

This appellee immediately countered at Special Term with a motion to dismiss the condemnation proceeding because of *res judicata*. The Special Term accordingly dismissed, and the Appellate Division unanimously affirmed, holding (to quote again, 285 App. Div. 1115, April, 1955):

> "We think the decision in the former action (*Black Riv. Regulating Dist.* v. *Adirondack League Club*, 307 N. Y. 475), requires us to affirm the judgment dismissing the complaint. In that decision the court said (p. 489): 'The plaintiffs * * * are effectively barred from maintaining condemnation proceedings.' *We are bound by that decision.* All concur." (Emphasis ours.)

The Jurisdictional Statement concedes (p. 15) that on that decision by the Appellate Division "Judgment of affirmance was entered in Jefferson County Clerk's office on May 5, 1955". Obviously, that judgment was not on any federal basis at all but solely and expressly on *res judicata*.

But, even if it had been in whole or in part on a federal basis, the time to attempt a review thereof in this Court has long since expired; and no such attempt has ever been or is now made.

(6) The appellant's ensuing appeal to the Court of Appeals taken solely "as a matter of right under Section 588, subdivision 1(a) of the Civil Practice Act", was dismissed by that Court on the ground that it was not within that Court's jurisdiction under the State Constitution and statutes. (309 N. Y. 798, October 13, 1955; and Jurisdictional Statement, pp. 15, 56.)

Obviously, the Supreme Court of the United States has no jurisdiction to review such a dismissal on such a ground.

This Court cannot, we respectfully submit, tell the Court of Appeals that it has misinterpreted the state law limiting its appellate jurisdiction, or that it has wrongly held that the judgment of the Appellate Division based on *res judicata* is not appealable to it as a matter of right under Section 588, subdivision 1(a), of the New York Civil Practice Act and the like restriction in the State Constitution.

This Court cannot, we respectfully submit, order the Court of Appeals to recall its order of dismissal and entertain the appeal.

In *Matter of Haydorn* v. *Carroll,* 225 N. Y. 84, 88, the Court of Appeals had determined that that Section's words "*directly involved*" were a jurisdictional limitation and required that the constitutional issue must be "not only directly but *necessarily* involved in the decision of the case".

(7) Moreover, where a constitutional question has been fully tried and judicially determined in a proceeding in which both parties have had their full day in court, the losing party cannot escape the *res judicata* by starting a new action against the other party, claiming that such judicial determination was wrong and had deprived him of the very constitutional rights which had been adversely determined therein. (*Bonner* v. *Gorman,* 213 U. S. 86, 91; *Baldwin* v. *State Traveling Men's Association,* 283 U. S. 522, 524-5; *Angel* v. *Bullington,* 330 U. S. 183, 190; *Fryberger* v. *Harris Co.,* 273 N. Y. 115, 118; *Matter of Kapf* v. *DuMond,* 298 N. Y. 859, 860.)

II

Summary of Reasons for Dismissal

(1) The appellant never had a right of appeal to this Supreme Court even from the final determination in 1954 in 307 N. Y. 475, 906, because that determination included separate and adequate non-federal bases.

(2) But, even if only federal bases had been involved, the appellant allowed to pass the time for seeking a review thereof in this Court, and hence allowed that 1954 determination to become irrevocably *res judicata.*

(3) Thereafter the appellant could not escape from that *res judicata* by seeking to revive its ancillary condemnation proceeding in the teeth of the Court of Appeals' 1954 determination in the appellant's declaratory judgment action that that very proceeding could not be maintained. (*Angel* v. *Bullington*, 330 U. S. 183, 190; *Ackermann* v. *United States*, 340 U. S. 193, 198.)

(4) Even if appellant could so escape, it let pass its time for attempting to seek a review by this Court of the judgment of the Appellate Division (285 App. Div. 1115, April 1955), affirming the dismissal of the condemnation proceeding,—a review which in any event would have been jurisdictionally impossible in this Court because the Appellate Division's judgment rested solely on *res judicata*,—an adequate non-federal basis.

(5) The appellant's ensuing appeal from the Appellate Division's judgment, taken "as a matter of right" to the Court of Appeals, was dismissed solely on an adequate state basis,—namely, as outside that Court's appellate jurisdiction as restricted by the State Constitution and statutes.

III

The dismissal should, we respectfully submit, be with double costs.

Although what we have said above is, we believe, ample for dismissal, we feel in duty bound to say something further and to ask an award of double costs under Section 2103 of Title 28, U. S. Code.

Since the passage of the Stokes Act [L. 1950, ch. 803], and notwithstanding its prohibition, the appellant Board of this local "agency of the State" (307 N. Y. 475, 487) has been stubbornly attempting to seize for its Panther Dam project not only appellee's land but also 1500 acres of state lands constituting the State Forest Preserve (301 N. Y. 219, 222).

The Board has persisted in so doing in defiance of continuous prohibitions by the People of the State in two referendums, by successive Legislatures, by the Governor who signed the Stokes Act, by the State Court of Appeals in four successive decisions, and by the successive Attorney Generals who have appeared before the courts in opposition.

The extraordinary experience of the People of New York with this small and defiant Board has been unique.

In 1950 the Legislature, aroused by the Board's proposed seizure of the State's Forest Preserve land, enacted the Stokes Act [L. 1950, ch. 803] as a flat prohibition of the Board's Panther Dam project. That Act took effect on April 20, 1950.

On July 11, 1950, the Court of Appeals, overruling the contentions of the Board, held that the Stokes Act had

"effectively and completely disposed of the Board's plan" for the Panther Dam and Reservoir alleged to be for regulation of the Black River (301 N. Y. 219, 222).

In July, 1951,—a year later—the Board nevertheless began two suits,—one for a judgment declaring the Stokes Act unconstitutional and authorizing the Board to seize for its Panther Dam project the State's Forest Preserve land and the appellee's land. The second was the very condemnation suit as to which this appellant was asking declaratory judgment authorizing the suit's maintenance.

Thereupon the Legislature proposed, and the People of the State by referendum at the general election in 1953 ratified, an amendment to the State Constitution abolishing all use of the State Forest Preserve for dams and reservoirs "to regulate the flow of streams". The amendment is known as "the Ostrander Amendment" (N. Y. Const., Art. XIV, §2). The popular vote was 1,002,462 for the Amendment and 697,270 against.

Thereupon and nevertheless, the Board challenged the right of the People to thus direct as to the People's own lands and streams, notwithstanding that under the State Constitution the lands and streams in the State's Forest Preserve "are for the people of the State as a whole". (*Association for the Protection of the Adirondacks* v. *MacDonald*, 253 N. Y. 234, 238.)

On July 14, 1954, the Court of Appeals again overruled the Board, and held (1) that the Ostrander Amendment was constitutional; and (2) that, in any event, the Board had no standing to challenge it. The State Attorney General appeared before the Court of Appeals in opposition to the Board. (See 307 N. Y. 475, 480.)

On November 15, 1954, and after waiting four months, the Board moved in the Court of Appeals for reargument. The motion was denied on December 2, 1954 (307 N. Y. 906).

Thereupon the Board revived its dormant condemnation proceeding in the very teeth of the Court of Appeals' decision that the Board had no power to continue with it, —and this notwithstanding that the Board itself had presented for declaratory judgment the very issue of its power to proceed with its condemnation suit.

For the fourth time the Court of Appeals held against the Board. On October 13, 1955, it dismissed the Board's appeal, attempted to be taken as a matter of right, from the unanimous decision of the Appellate Division dismissing the Board's condemnation proceeding as precluded by *res judicata*. Again the Attorney General of the State appeared before the Court of Appeals in opposition to the Board and advocated dismissal of its appeal. (See 309 N. Y. 798.)

The 1954-5 Legislature then decided, at the Board's urgent request, to allow the Board to put to the test its claim that the people of the State really wanted the Panther Dam. The Legislature submitted that precise question to referendum at the general election in November, 1955. The popular vote was 1,622,196 *against* the Dam, and only 613,927 in favor,—*an adverse vote of nearly 3 to 1.* Out of the sixty-two counties in the State, *only two* small counties—Jefferson and Lewis—voted for the Panther Dam.

Notwithstanding this overwhelming popular defeat in the very test proposed and requested by the Board itself, this Board is even now still persisting in open defiance of

the People, the Legislature, the Executive and the Courts of the State of New York. It now attempts to invoke the aid of the Supreme Court of the United States in putting its Panther Dam on the lands of the State and the appellee.

Construction of the Panther Dam has never "actually been commenced" (301 N. Y. 219, 222). The Board would now have this Honorable Court direct that its construction be commenced and that the State of New York submit to its erection and maintenance by this Board.

All this recalcitrance and litigiousness by this local Board over a period of six years has been extremely costly to this appellee. For six years the Board has been using this appellee as a sort of lay figure for the Board's waging of war against the State and the People, and has been seeking, through forms of actions ostensibly directed against the appellee's lands, in reality to seize for its project the State's Forest Preserve lands against the emphatically expressed will of the People, legislative enactments and judicial decisions.

Since this appeal is, we submit, without substance and is a continuation of this indefensible course of forcing upon this appellee the costs of this Board's defiance of the State as its principal, the dismissal should, we respectfully urge, carry double costs as provided for such a case by Section 2103 of Title 28, U. S. Code.

IV

We respectfully submit that the appeal and the alternative application for a writ of certiorari should be dismissed, with double costs.

Respectfully submitted,

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 732.

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,

Appellant,

v.

ADIRONDACK LEAGUE CLUB,

Appellee.

Appellant's Brief Opposing Motion to Dismiss.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1956

Subject Index.

	Page
Appellant's Brief Opposing Motion to Dismiss	1
Summary of Reasons for Denying the Motion to Dismiss	2
A. The appellant District has standing to appeal despite its "public" character	4
B. The New York Court of Appeals decision in 1954 reported 307 N. Y. 475, 906, does not bar the present appeal	10
C. The disposition of the present case by the Appellate Division, Fourth Department, in April, 1955 (285 App. Div. 1115), does not conclude the rights of the appellant District on this appeal	13
D. The Federal Question is Substantial	14
E. Double Costs	15

CASES CITED:

	Page
Bull v. Stichman, 273 App. Div. 311, affd. 298 N. Y. 516	5
Braun v. State of New York, 203 Misc. 563 (N. Y. Ct. of Claims, 1952)	6
County Board v. State Milk Commission, 346 U. S. 932 (1954)	2, 9, 10, 15
Dartmouth College v. Woodward, 4 Wheat. 518 (1818)	6
Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512 (1949)	6
Grand Trunk Western Railway Company v. City of South Bend and Others, 227 U. S. 544 (1913)	3, 14
Pantess v. Saratoga Springs Authority, 255 App. Div. 426 (3d Dpt., 1938)	6
Pawhuska v. Pawhuska Oil and Gas Co., 250 U. S. 394 (1919)	2
Russell v. Sebastian, 233 U. S. 195 (1914)	3, 14
Stern, Morgenthau & Co., Matter of Arbitration, 308 N. Y. 961 (1955)	14
Trenton v. New Jersey, 262 U. S. 182 (1923)	7
Wieman v. Updegraff, 344 U. S. 183 (1952)	7
Wm. Penn Fire Insurance Co., Matter of Arbitration, 308 N. Y. 963 (1955)	14
Williams v. Baltimore, 289 U. S. 36 (1933)	2, 7

OTHER AUTHORITIES:

	Page
McKinney's "Public Authorities Law," Vol. 42, Consolidated Laws of New York	5
New York Public Authorities Law, L. 1939, Ch. 870, Ch. 43-A., Consolidated Laws	4
New York Public Authorities Law, Title 6, Sec. 1433-b, Laws 1955, Chapter 850	5

IN THE

OCTOBER TERM, 1955.

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,
Appellant,
v.
ADIRONDACK LEAGUE CLUB,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

The appellee, Adirondack League Club, in its brief for dismissal presents essentially three arguments. It contends, though without protracted discussion, that the appellant District, which it terms "a minor administrative agency of the state," may not challenge the constitutionality of a legislative act (p. 8). The appellee also contends, at much greater length, that the 1954 decision of the New York Court of Appeals, handed down in a declaratory judgment action (307 N. Y. 475,* Appendix to the appellant's Jurisdictional Statement, pp. 46-55), determined adversely to the appellant District any constitutional rights it might have; and that

* Motion to grant re-argument or to amend remittitur denied, 307 N. Y. 906 (Dec. 2, 1954).

failure of the District to appeal from that judgment has precluded any rights of the appellant on this present appeal (Appellee's Brief, p. 9). The appellee Club also contends (Appellee's Brief, pp. 10 and 11) that the decision of the New York Appellate Division in the present action in April, 1955, reported 285 App. Div. 1115, was solely on state grounds; that the New York Court of Appeals had no jurisdiction to review that judgment as a matter of right; and hence that there are adequate state grounds for the dismissal of the present action by the Court of Appeals, of which review is here sought in the Supreme Court of the United States.

The appellant District submits that these arguments are without merit, it opposes dismissal and urges that probable jurisdiction be noted; or at least, if this Court should deem the jurisdictional questions doubtful, that it postpone consideration of them until argument on the merits.

Summary of Reasons for Denying the Motion to Dismiss.

A. The appellant District, despite its "public" character, should not be precluded to assert Fourteenth Amendment rights in this court under the doctrine of *Pawhuska v. Pawhuska Oil and Gas Co.*, 250 U. S. 394 (1919), and *Williams v. Baltimore*, 289 U. S. 36 (1933). These cases must be taken to be qualified by *County Board v. State Milk Commission*, 346 U. S. 932 (1954) (p. 4, *infra*).

B. The New York Court of Appeals decision in 1954, reported in 307 N. Y. 475, does not prevent this appeal; as the issue of constitutionality, though mentioned in that Court of Appeals opinion, was not actually there adjudged.

C. The disposition of the present case by the Appellate Division, Fourth Department, in April, 1955, 281 App. Div. 1115, does not conclude the rights of the appellant District on this appeal. The constitutional question remained open as demonstrated in point (B) above, and the appeal to the New York Court of Appeals on constitutional grounds raised that question in that court. The dismissal of the appeal by the New York Court of Appeals, 309 N. Y. 798 (1955), does not state its grounds, and if, as the appellant District here contends, its federal constitutional rights were properly before the New York Court of Appeals, the disposition of the case by that Court in 1955 passed on the federal constitutional rights of the appellant District, and is hence reviewable as of right in this court (p. 10, *infra*).

D. The federal question asserted by the appellant District is substantial, involving the principles of *Grand Trunk Western Railway Company v. City of South Bend and Others*, 227 U. S. 544 (1913), and *Russell v. Sebastian*, 233 U. S. 195 (1914) (p. 11, *infra*).

E. For the reasons set forth in this brief, the motion to dismiss this appeal should be denied. The appellee Adirondack League Club should therefore not only be denied double costs but single costs as well.

A.

The appellant District despite its "public" character, has standing to be heard in this Court, not only to protect rights of its own under the federal constitution, but also to assert the rights of other individuals and private corporations in a representative capacity.

Conspicuous in American life is the increasing use of corporate creatures such as Authorities, on the borderline between public and private corporations, of which the appellant District furnishes an example. The appellant District, if it were created today, might well be created as an "Authority" as it has the traits of such a corporation, including the power to indebt itself by issuing its obligations, which it has exercised.

A year before the New York Public Authorities Law was enacted in 1939 (L. 1939, Ch. 870, Ch. 43-A, Consolidated Laws) the New York Law Revision Commission, in its recommendation of that statute, pointed out:

> "There are in existence today twenty-two corporate instrumentalities of the state of New York, generally known as 'authorities,' created by act of the legislature* for the furtherance of various self-liquidating public improvements or enterprises, such as parkways, bridges, regional markets and hydro-electric power development systems. The creation of a twenty-third, the New York City Parkway Authority, is now before the legislature. In additon, there are several authorities created by local action pursuant to general law, of which

* This does not include the Port of New York Authority and the Lake Champlain Bridge Commission, which were created pursuant to interstate compacts, nor the Buffalo and Fort Erie Bridge Authority created by New York and Canadian statutes which have the force of an international agreement [footnote of New York Law Revision Commission].

> three—the New York City, Buffalo and Schenectady housing authorities—have been specifically validated by the legislature."

The introduction to the now current McKinney's "Public Authorities Law," Volume 42, Consolidated Laws of New York, describing the status of Authorities in New York in 1950 points out:

> "Since the publication of the Public Authorities Law in 1939, fifty-two authorities have been added to the law. These authorities affect bridge, housing, parking, water and other projects throughout the State. These, together with the authorities effective in 1939 constitute a vital and growing segment of statutory law."

The 1955 supplement to McKinney's "Public Authorities Law" lists a large number of additional Authorities created in New York since 1950. An example of such a corporation on the borderline between the public and the private corporation is the "Dormitory Authority" existing under Title 6 of the New York Public Authorities Law, which under Section 1433-b as added by the Laws of 1955, Chapter 850, is authorized to construct and operate dormitories and attendant facilities for students attending educational institutions within the State of New York, other than state-operated institutions. The "Dormitory Authority," under this section, is ultimately to transfer title to all the real and personal property of such a dormitory and "attendant facility" to the educational institution in which it is operated, but not until all bonds issued "on such dormitory" should have been paid in full, or otherwise discharged. It would not be difficult to imagine a small alteration in the actual facts of *Bull v. Stichman*, 273 App. Div. 311, affd. 298 N. Y. 516 (1948) (cited by the appellee Club in its motion and brief for dismissal, pp. 7 and 8). Canisius College, instead of financing its renovated building as there de-

scribed, might now choose to avail itself of the New York Dormitory Authority. If Canisius College should then pay nine-tenths of the outstanding bonds, and at that point the New York Legislature should decide to repeal Title 6 of the New York Authority Law and turn over the dormitory in question to the City of Buffalo for a municipal hospital, the appellee, Adirondack League Club, to be consistent with the ground of its present motion, would have to take the position that the Dormitory Authority under these circumstances has no protection against the arbitrary action of the State of New York. The appellee Club would logically have to take that position despite the duties owed by the Dormitory Authority to its bondholders, and to Canisius College itself.

The New York Courts have found it somewhat difficult to describe these governmental hybrids. See *Pantess v. Saratoga Springs Authority*, 255 App. Div. 426 (3 Dpt. 1938), and *Braun v. State of New York*, 203 Misc. 563 (Ct. of Claims, 1952). The difference between the appellant District and such corporations as the New York Dormitory Authority and Dartmouth College (*Dartmouth College v. Woodward*, 4 Wheat. 518 [1818]), and Stuyvesant Town Corporation (*Dorsey v. Stuyvesant Town Corp.*, 299 N. Y. 512 [1949], C. d. 399 U. S. 981 [1950]) which the appellee seems to take for granted, appears less clear on close examination. It is, of course, quite clear that the appellant District is not in all respects like a Dormitory Authority or the Saratoga Spring Authority. However, when the appellee Club, in its brief (p. 8) makes the sweeping statement that:

> "The State has an overriding power to terminate a subordinate body or to forbid exercise of its powers; and the subordinate body cannot seek federal protection for insubordination,"

the Club is making a wide assumption. There can no longer be said to be any universal principle that the Supreme Court will never intervene in the arrangements between a state and its subordinates. In 1952 this Court held that arbitrary dismissal of a state employee was under the circumstances a violation of the Fourteenth Amendment. *Wieman v. Updegraff*, 344 U. S. 183 (1952). In the instant case there are three individuals forming a corporate body; the reason why they should have no constitutional protection is not obvious, despite broad language in *Trenton v. New Jersey*, 262 U. S. 182 (1923), and *Williams v. Baltimore*, 289 U. S. 36 (1933).

The Appellate Division, Fourth Department, in its opinion of May 23, 1953 (282 App. Div. 161, at pp. 168-169, 170, reprinted in the Appendix to the Jurisdictional Statement herein, pp. 37-39 and 41-42), correctly and unanimously stated the law herein, the appellant contends. That Court wrote:

> "We turn now to the defendant's contention that the plaintiff Regulating District as a public corporation is an agency of the State created to perform state functions and is without power to question the validity of the acts of the Legislature. There is an abundance of authority that such is the general rule. We have already held that the plaintiff is a State agency; that the members of the Board of the District are State officers, and that their acts are acts of the State (*Matter of Adirondack League v. Black River Regulating District*, 275 App. Div. 618, 626). (See also *Breen v. Mortgage Commission*, 285 N. Y. 425, 430; *Gaynor v. Marohn*, 268 N. Y. 417, 425.) Most of the cases cited in the briefs upon this point involve municipal corporations, but the well-established rule that the power of the Legislature is supreme and not subject to being questioned by State agencies must apply to public corporations, like the plaintiff, as well as to municipalities. In fact, the term 'public

corporation' as defined by General Corporation Law, Section 2, includes both municipal corporations and district corporations. It is generally held that 'being but creatures of the State municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment to the Constitution in opposition to the will of their creator' (*Coleman v. Miller*, 307 U. S. 433, 441; *Trenton v. New Jersey*, 262 U. S. 182; see also *County of Albany v. Hooker*, 204 N. Y. 1).

"The status of the plaintiffs here, however, and their ability to test the validity of an act of the Legislature should not be determined entirely by the general rules mentioned in the decisions cited. Here, according to the complaint, acting under statutory authority plaintiffs have proceeded to perfect the plan and make a final order and in so doing have incurred an indebtedness represented by over two hundred thousand dollars worth of certificates of indebtedness. According to the complaint the plaintiffs will be unable to meet these contract obligations with the certificate holders except from the proceeds of a bond issue and bonds may not be issued if the project is halted at this juncture. Thus plaintiffs, acting under statute, have incurred independent obligations and now allege that the action of the Legislature has rendered them helpless to meet their contractual obligations.

"Legislation revoking the taxing powers of a municipality or state agency may be invalid as impairing the obligation of contract in some situations. 'It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given thus becomes a trust which the donor cannot annul, and which the donee is bound to exe-

cute; and neither the State nor the corporation can any more impair the obligation of contract in this way than in any other' (*Von Hoffman v. City of Quincy*, 4 Wall. 535, 554)." * * *

"The complaint alleges in effect that the plaintiffs have no way of meeting their contractual obligations under the certificates of indebtedness except by issuance of bonds which in turn would be retired from the proceeds of taxes levied on the properties benefited from the project.

"While the plaintiff Regulating District constitutes a State agency for carrying out sovereign powers of the State, still it would seem to act in its own corporate capacity as a principal and not as an agent of the State in the matter of issuing of certificates of indebtedness; it does not appear that the State has pledged its credit for the payment of such indebtedness (see discussion *Peo. v. Ingersoll*, 58 N. Y. 1, at p. 30). It follows that since the Stokes Act has effectively cancelled the power of the plaintiffs to issue bonds and levy taxes on the property which would have been improved by this particular project, and since the plaintiffs are and will remain liable on the certificates of indebtedness, the plaintiffs have an independent interest separate and apart from their status as agents of the State to test the validity of the Stokes Act. The removal of the plaintiffs' power to issue bonds and levy taxes with which to retire these certificates of indebtedness gives to the plaintiffs such an independent interest as to entitle them to test the validity of the act of the Legislature. Therein lies the distinction between this case and *County of Albany v. Hooker*, 204 N. Y. 1. Even the State itself may in a proper case assert the unconstitutionality of the acts of its legislature (*First Construction Co. v. State of N. Y.*, 221 N. Y. 295, 310)."

The "Appellant's Memorandum Reply as to Jurisdiction" in *County Board v. State Milk Commission*, 346 U. S. 932 (1954), stresses the representation, by the

Arlington County Board, of the milk consumers of Arlington, as a ground for sustaining this Court's jurisdiction. So in the present case, the holders of the appellant District's certificates of indebtedness and the individual and corporate beneficiaries of the District's work may be heard through the District. This matter is of such importance, and is put in such a new light by *County Board v. State Milk Commission*, 346 U. S. 932 (1954), that it should not be disposed of on motion to dismiss.

B.

The New York Court of Appeals decision in 1954, reported 307 N. Y. 475, 906, does not bar the present appeal.

The appellee, Adirondack League Club, contends that the 1954 decision is *res judicata*, and substantially ends the controversy here in question. The effect of an action as *res judicata* depends upon the judgment entered at the end of the case. The appellant District here contends that no Court, prior to the present action, ever entered a judgment actually disposing of the constitutionality of the Stokes Act.

The New York Supreme Court, Special Term, in deciding the case which ultimately reached the Court of Appeals in 1954, disposed of it as described by Mr. Justice Bastow in the supplemental opinion set forth in page 12 in the body of the Jurisdictional Statement, and at page 27 in the Appendix thereto. Mr. Justice Bastow disclaimed passing on the constitutional question; he wrote of his dismissal of the District's action for a declaratory judgment:

> "Upon the settlement of the order to be entered upon the court's decision of March 24, 1952, a question has been raised as to the scope of that decision. To clarify the matter, the court has not passed upon or decided the questions as to the alleged unconstitutionality of the Stokes Act (Laws 1950, Chapter 803) attempted to be raised by the complaint of the plaintiff."

The District then appealed to the Appellate Division, Fourth Department, from the order and judgment so entered. The Appellate Division, in its opinion of May 27, 1953, reported 282 App. Div. 161, set forth in the Appendix to the Jurisdictional Statement, page 28 *et seq.*, reversed the judgment and order of the Special Term and held that the plaintiffs in their action had standing to raise the constitutional questions involved. (See the opinion of the Appellate Division, p. 41 of the Appendix to the Jurisdictional Statement.) The Appellate Division, however, certified seven questions to the New York Court of Appeals (Jurisdictional Statement, p. 49).

The New York Court of Appeals on July 14, 1954, in its opinion, reported 307 N. Y. 475 (Appendix to Jurisdictional Statement, p. 46 *et seq.*), answered only three of the seven questions certified by the Appellate Division to the Court of Appeals (see Appendix to Jurisdictional Statement, pp. 55 and 49). The Court of Appeals thus held (1) that the Appellate Division was in error on a matter of law in reversing the judgment of the Special Term; (2) that the defendant, Adirondack League Club, was entitled as a matter of law to judgment dismissing the complaint. In its affirmative answers to these questions, therefore, the New York Court of Appeals in 1954 clearly held that Justice Bastow at Special Term had been correct in his judgment in which, as he stated, he "had not passed

upon or decided the questions as to the alleged unconstitutionality of the Stokes Act (Laws 1950, Chapter 803) attempted to be raised by the complaint of the plaintiff."

The Court of Appeals also answered affirmatively the question whether the plaintiffs were without power or standing to question the constitutional power of the State Legislature to adopt the Stokes Act. This, if anything, only accentuates the fact that in the disposition of that litigation by the Court of Appeals, the question was never passed on. The New York Court of Appeals, by thus in effect affirming the judgment of the New York Special Term by Bastow, J., affirmed his refusal to pass on the constitutional question now raised before the Supreme Court of the United States. As the Court of Appeals refused to pass on the constitutional question in 1954, the proceedings of that year cannot have barred the constitutional rights which the appellant District here asserts.

The Court of Appeals, to be sure, in its opinion (p. 54, Appendix to the Jurisdictional Statement) made the following self-contradictory statement:

> "The plaintiffs, either as a body politic or as individuals, are effectively barred from maintaining condemnation proceedings and have no standing in law either to challenge the applicability of the Stokes Act or the Ostrander amendment. Having reached the conclusion that the Stokes Act is constitutional and that the plaintiffs lack status to challenge its validity, we see no necessity for passing on any other question."

But the action of the Court of Appeals (as distinguished from the observations at the end of its opinion), consisted of its answers to the certified questions, which in effect stated that the disposition at the Special Term by Judge Bastow was correct.

C.

The disposition of the present case by the Appellate Division, Fourth Department, in April, 1955 (285 App. Div. 1115), does not conclude the rights of the appellant District on this appeal.

The argument of the appellee, Adirondack League Club, on this point is ultimately the same as that just discussed—that is, that the Court of Appeals in 1954 finally decided all constitutional questions. If (contrary to the assertion of the appellant District) this conclusive adjudication had occurred, and if no constitutional question thereafter survived in the present action before the New York Special Term or the New York Appellate Division, then no appeal to the Court of Appeals on a constitutional question remained possible herein. However, if (as the appellant District here contends is the true view) the Court of Appeals did not actually adjudge the constitutional question in 1954, that question remained open in the New York Special Term and Appellate Division, 1955; the appellant's appeal to the New York Court of Appeals on constitutional grounds in that year was well founded; and the way remains open for the present appeal to the Supreme Court of the United States.

The memorandum decision by the Court of Appeals, of ~~December 10~~, 1955, from which this appeal is taken (309 N. Y. 798, see Appendix to Jurisdictional Statement, p. 56), does not state the ground on which the New York Court of Appeals dismissed District's appeal. It does recite that the appeal was taken on "alleged constitutional grounds," and it recites the motion of the Adirondack League Club "to dismiss the appeal on the ground, among others, that no constitu-

tional question is involved." The New York Court of Appeals sometimes dismisses appeals because it deems the substantive questions unsubstantial (see e. g., *Matter of Arbitration, Stern, Morgenthau & Co.*, 308 N. Y. 961 [1955], and *Matter of Arbitration, Wm. Penn Fire Insurance Co.*, 308 N. Y. 963 [1955]). The Court of Appeals' memorandum of December 10, 1955, is entirely consistent with a dismissal on the erroneous ground that the District's federal constitutional rights were unsubstantial. In the absence of any statement of a reason for dismissal, the United States Supreme Court should not presume that the New York Court of Appeals dismissed on an exclusively state ground.

The appellant District here asserts that the federal constitutional question survives all the previous dispositions in the New York courts and is here available.

D.

The Federal Question is Substantial.

The motion and brief for dismissal filed by the appellee, Adirondack League Club, does not discuss or attack the contention of the appellant District that there is in this case an important question of substance, which is discussed in the Jurisdictional Statement at pages 19, 20 and 21. If the appellant District were a non-public corporation which has been granted the rights and franchises which the District held at the time the Stokes Act was passed, the cases there cited, *Grand Trunk v. City of South Bend*, 277 U. S. 544 (1913), and *Russell v. Sebastian*, 233 U. S. 195 (1914), never repudiated by the Supreme Court of the United States, would clearly present a substantial question of constitutional right in

the appellant. The appellant here contends that nothing in its "public" character deprives it of its right to be heard in the Supreme Court of the United States and to assert that under the doctrine of those cases its rights under the Contract Clause of the Fourteenth Amendment, and the rights of those for whom it speaks under the doctrine of *County Board v. State Milk Commission*, 346 U. S. 932 (1954), have been invaded by the State of New York.

E.

Double Costs.

The appellee, Adirondack League Club, has moved that this appeal be dismissed with double costs under Section 2103 of Title 28, U. S. Code. As the appellant District, on the contrary, urges that the appeal be not dismissed, its position is that neither single nor double costs are properly allowable against it. In the present case the Stokes Act is the substantial subject of controversy; and appeal appears to be the appropriate method to seek review in the Supreme Court of the United States. Furthermore, the respondent Club has suffered no damages from delay. Indeed delay, not only temporary but permanent, is what the respondent Club seeks and has thus far achieved; it seeks not only to delay, but permanently to prevent the condemnation of its land, which is the subject matter of the litigation.

The appellant here seeks review of a long-standing and increasingly-important question of public law—the question whether a corporation which has both private and public aspects, and which acts for the benefit of the holders of its obligations and those who benefit from its

work, has any constitutional protection against arbitrary state action. The appellant District should not only be free from penalty for seeking this review; it should be heard, and should be granted the substantive relief which it seeks.

Respectfully submitted,

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408 Watertown National Bank Building,
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APR 23 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955.

No. 732.

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,

Appellant,

v.

ADIRONDACK LEAGUE CLUB,

Appellee.

BRIEF OF THE CITY OF WATERTOWN, NEW YORK, AS *AMICUS CURIAE.*

PAUL E. BROWN,
Counsel.

KENNETH W. BRETT,
Corporation Counsel,
City Hall,
Watertown, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—1956

Index.

Page

Preface. Resolution of the City Council of the City of Watertown adopted April 2, 1956, directing the filing of its brief amicus curiae 1

POINT:

I. The dismissal of the prior action brought for a declaratory judgment was on an express holding by the New York Court of Appeals that plaintiffs had no standing to maintain it. The action itself failing, there could have been no adjudication within it 4

II. How to Proceed 6

(a) The River Regulating Board having the statutory right of eminent domain since its creation in 1919 could properly go forward with this condemnation proceeding, and, as against the asserted defense of the Stokes Act advanced by the League Club, properly maintain that the Stokes Act would impair its constitutionally protected rights.

(b) The Regulating Board could not ask review by this Court until the Stokes Act was actually applied to its injury, and this was only when its condemnation proceeding was dismissed.

III. The controversy presents the classic questions of constitutional law which are for the decision of this Court upon its independent judgment: (a) Was there a contract; (b) What obligation arose from it; (c) Has it been impaired by subsequent legislation 11

Page

IV. Decisions affecting similar districts or "authorities" in other states support appellant's position 16

V. The Stokes Act offends against due process in arbitrarily barring reservoir construction by appellant on a particular branch of a tributary stream within two named counties, while leaving the appellee free to build a comparable reservoir on its own land constituting part of the very site sought to be developed by the appellant Regulating District 19

VI. The subsequent amendment of the New York Constitution (the Ostrander Amendment, effective 1954) is subject to the same infirmities as the Stokes Act, so far as completion of Panther Mountain Reservoir is concerned 21

VII. There are other substantial questions of constitutional law raised, now reserved, and more appropriately to be presented after this Court shall have noted probable jurisdiction of this appeal 22

VIII. Conclusion 22

APPENDIX:

1. Outline map showing location and boundaries of Black River Regulating District 24

2. Map showing state and private lands in Adirondack Park 24

3. Copy of petition by City of Watertown and others (1919) for creation of Black River Regulating District as a corporation 28

TABLE OF CASES:

Page

Adirondack League Club vs. Black River Regulating District, 275 App. Div. 618, 621 8

Ashwander vs. T. V. A., 297 U. S. 288, 324-5; 56 S. Ct. 466, 473 9

Bandini Petroleum Co., 284 U. S. 8, 22; 52 S. Ct. 103, 108 8

Bourjois, Inc., vs. Chapman, 301 U. S. 183, 188; 57 S. Ct. 691, 694 9

Buchanan vs. Red Banks Creek District, 39 Southern (2) 321 17

Cherokee Nation vs. Georgia, 5 Pet. 1, 75 as quoted in New Jersey vs. Sargent, 269 U. S. 328; 46 S. Ct. 122 9

Curran vs. State of Arkansas, 15 How. (U. S.) 304, 313 18

Detroit United Railway vs. Michigan, 242 U. S. 238, 249; 37 S. Ct. 87; 61 L. Ed. 268, 274 11

District No. 2 vs. Mercantile Bank, 69 Fed. (2) 138, 140 18

Drainage District No. 7 vs. Hutchins, 42 S. W. (2) 996, 1000; 184 Ark. 521, 529 17

Highland Dairy Farms, 300 U. S. 608, 617-618; 57 S. Ct. 549, 553 9

Houston and Texas Railway vs. Texas, 170 U. S. 243, 257, 261 ..... 14, 21

International Longshoreman's Union vs. Boyd, 374 U. S. 222, 223; 74 S. Ct. 447, 448 ..... 6, 8

Louisiana vs. Pilsbury, 105 U. S. 278, 288 ..... 13, 20

Page

New Jersey vs. Yard, 95 U. S. 104, 114 13
New Orleans Gas Co., 115 U. S. 650 21
New York Electric Line Company vs. Empire City Subway Company, 235 U. S. 179 at 193, 59 L. Ed. 184, 192 20

Russell vs. Sebastian, 233 U. S. 195, L. Ed. 912 ..... 14, 21

South Bend, 227 U. S. 544 14
State vs. Brand, 303 U. S. 95, 100, 58 S. Ct. 443, 446 13
Stern vs. Board of Levee Comr's, ... U. S. .....; cert. denied 1955 term No. 116, 24 L. W. 3068 7

Utah Power & Light Co. vs. Pfost, Commissioner, 286 U. S. 165, 186; 186 S. Ct. 548, 554 10

White vs. Johnson, 282 U. S. 367, 373; 51 S. Ct. 115, 118 8
Wickkam vs. Grand River Dam Authority, 118 Pacific (2) 640 16

STATUTES:

Stokes Act, New York Laws 1950, Chap. 803 4

Conservation Law:

Section 445 7
Section 443 8
Section 431 9
Section 432 12
Section 434 12
Section 430 13

New York Law, Rules of Civil Practice, Rule 212 6

New York Constitution, Article XIV, Section 2, as approved in 1913 as then Article VII, Section 7 ..... 11, 14

Resolution of the City Council of the City of Watertown, New York, at its Meeting Held April 2, 1956.

RESOLUTION

	Yea	Nay
Mayor Lachenauer, William G.	X	
Councilman Field, William T.	X	
Councilman Flynn, William J.	X	
Councilman Hayes, Charles W.	X	
Councilman Wardwell, Samuel B., Jr.	X	

By Councilman William T. Field

Resolved, that

WHEREAS the City of Watertown, New York, a political subdivision of the State of New York, has since 1913 constantly sought, and hoped for, the improvement and regulation of the flow of Black River, which bisects said City, furnishes its water supply for domestic and industrial uses, and furnishes the energy for its municipal electric plant, and

WHEREAS the regulation of said river is needed also to lessen damage by flood waters and to improve sanitary conditions, and

WHEREAS upon the petition of said City of Watertown and other interested riparian owners filed on March 13, 1919, pursuant to the provisions of the Conservation Law of the State of New York (Laws 1915, Chap. 662, as amended) and the provisions of the New York State Constitution (then Article VII, Section 7) the Black River Regulating District was organized to accomplish such regulation, and

WHEREAS said Black River Regulating District then entered upon the work of such river improvement and erected the Stillwater Reservoir on the Beaver River

tributary as the first stage of the work so authorized, and whereas the Stillwater Reservoir has since its completion in 1925 contributed substantially to the health and welfare of this community by lessening floods and increasing the average minimum low water flow of the river, and

WHEREAS it was contemplated at the time the Black River Regulating Board was created that a system of reservoirs would be constructed so as to increase the average minimum low water flow from 500 to 2,000 cu. ft. per second, with the cost of such improvement to be paid for by "the public and private property and municipalities benefited to the extent of the benefits received," and whereas a regulating reservoir on the south branch of the Moose River was and is an integral part of the whole plan, and

WHEREAS all preliminary engineering and planning had been done for construction of such a reservoir (Panther Mountain) and over one-quarter of a million dollars had been expended therefor prior to enactment of the so-called Stokes Act in 1950, the immediate effect of which if valid would be to make impossible the construction of Panther Mountain Reservoir and to subject this City and other riparian owners to benefit assessment for benefits long contemplated and authorized but now snatched away and wholly destroyed, and

WHEREAS the Black River Regulating Board is now appealing to the Supreme Court of the United States, attacking on constitutional grounds the validity of the Stokes Act and the Ostrander amendment to the State Constitution, and this City is vitally interested in sustaining the position of said Regulating Board, and whereas this City has the privilege under Rule 42 (4) to file its brief *amicus curiae*, it is hereby

RESOLVED that the City of Watertown cause a brief in its behalf to be made and filed with the Supreme Court of the United States, in the pending appeal No. 732, supporting in all proper ways, and as strongly as possible, the position of the Black River Regulating District that the Constitution of the United States protects the right to construct Panther Mountain Reservoir and to complete to that extent the river regulation improvement under way and being paid for by this City and other "benefited" properties since 1919, and the Corporation Counsel of this City as its authorized law officer is instructed and directed to proceed accordingly.

Seconded by Councilman Samuel B. Wardwell, Jr.

State of New York,
Jefferson County, ss:
City of Watertown,

I, E. P. GOODWIN, Deputy City Clerk of the City of Watertown, hereby certify that the within Resolution was adopted at a meeting of the City Council of said City, held April 2, 1956, and that the same is the whole of said resolution.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said City of Watertown, N. Y.

s/ E. P. GOODWIN,
Deputy City Clerk.

(Seal)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,
Appellant,
v.
ADIRONDACK LEAGUE CLUB,
Appellee.

Brief of the City of Watertown as *Amicus Curiae*, in Support of Appellant's Position.

The resolution of the City Council, printed as a preface to this brief which it directed to be filed, sets forth the City's very direct and substantial interest in the controversy. The right to file a brief is granted by Rule 42 (4).

I.

Untangling the procedural snarl.

A determination that the Stokes Act, New York Laws 1950, Chap. 803, offends the Constitution of the United

States is essential to maintenance of this proceeding to condemn the one and only parcel of privately owned land which would become the major portion of the bed of the multiple purpose river regulating reservoir proposed to be constructed by appellant Board. In a proper attempt to simplify the determination of this proposition, and to present only questions under the Federal and State Constitutions the Board started in the New York Court an action for a declaratory judgment, at the same time as this condemnation proceeding was begun.

The declaratory judgment action was in aid of the condemnation proceeding, and ancillary to it, rather than the other way around as appellee would contend (League Club brief, p. 6).

The Special Term first hearing the declaratory judgment case dismissed the complaint of the Regulating District. Justice Bastow wrote:

> "* * * it follows that plaintiffs may not prosecute this action for the sole purpose of obtaining an advisory opinion as to the constitutionality of * * * the Stokes Act" (fol. 191).

In his supplemental memorandum he made it explicit and crystal clear that he had "*not* passed upon or decided the questions as to the alleged unconstitutionality of the Stokes Act" (fol. 194).

The Appellate Division, in reversing, held that jurisdiction of the matter should be taken as a matter of discretion (282 App. Div. 161, 172).

The Court of Appeals answered a certified question No. 4 in the affirmative—that plaintiffs (Regulating District and Board) were "as a matter of law, without power or standing to question the constitutional power of the State Legislature to adopt the so-called Stokes Act" (307 N. Y. 475, 486).

Under New York Law (Rules of Civil Practice, Rule 212) it is entirely a matter of discretion whether jurisdiction shall be taken of any action for a declaratory judgment.

If we take the same close look at the situation that this Court did in *International Longshoremen's Union vs. Boyd*, 347 U. S. 222, 223, 74 S. Ct. 447, 448, with the Court of Appeals answering question 4 as it did, "there is an end of the matter"[1]. There was, in effect, no action, and there could be no determination of rights therein.

Legally and logically, the declaratory judgment action was concluded. The plaintiffs had no standing to maintain it, said the Court of Appeals; therefore there was no action. The only correct judgment under the Court of Appeals decision was to dismiss the complaint. This was what Justice Bastow had ordered in the first instance; it was what this Court ordered in the *Longshoremen's* case.

Of course, refusal to entertain jurisdiction of a declaratory action being a matter of discretion under New York law, no appeal to this Court on Federal grounds would lie from the 1954 decision.

II.

How to proceed?

The effort to simplify the issues to straight constitutional issues now having resulted in a dismissal of the complaint for asserted want of capacity in the plaintiffs, and the Court of Appeals in the legal vacuum of its own

[1] 347 U. S. at p. 223.

creation "having reached the conclusion that the Stokes Act is constitutional and that the plaintiffs lack status to challenge its validity"[2] without recognizing that the second half of its "conclusion" rendered the first half both unnecessary and improper under long settled principles of constitutional law, the plaintiff Regulating Board was required to move forward its proceeding for condemnation of the League Club's land required for the reservoir.

Section 445 of the Conservation Law granted to "said board, on behalf of such district, * * * a dominant right of eminent domain * * *" and Section 431 declared a river regulating district a public corporation, with perpetual existence, power "to sue and be sued, to incur contract liabilities, to exercise the right of eminent domain * * *."

The right of eminent domain is a substantial right, one which could be classified as vested, and to be distinguished from a merely discretionary "right" to bring or maintain an action for a declaratory judgment. The right of eminent domain could be an object constitutionally protected. It might even be that the Court of Appeals would see the difference, or would apply the Stokes Act only prospectively[3] to new reservoirs in Herkimer or Hamilton Counties on the south branch of a particular tributary of the Black River. Or the Court of Appeals might well say that although the Regulating Board could not initiate a frontal attack on the constitutionality of the Stokes Act, no right legal principle should deny it the power

[2] 307 N. Y., bottom of pp. 489, 490.

[3] The holding that it was prospective in operation seems to have saved a Louisiana constitutional amendment limiting a levee board's power to impose taxes for construction and maintenance of levees.

Stern vs. Board of Levee Comr's, ... U. S. ....; cert. denied 1955 term No. 116, 24 L. W. 3068.

to *resist* the application of the Stokes Act, adopted i
1950, to prevent it completing a much needed reservoi
included in its "Official Plan" ever since 1920 approve
by the State as provided in Section 443 of the Conserva
tion Law, and upon which the Board had spent ove
$200,000 in preliminary engineering and other necessar
expenses.

Reviewing the determination of the Regulating Boar
made in 1948 to construct Panther Mountain Reservoi
the Appellate Division

> "* * * reached the conclusion that there had bee
> a substantial compliance with the applicable pro
> visions of Article VII of the Conservation Law an
> that all the steps have been taken which are re
> quired at this stage of the proceedings."
>
> *Re: Adirondack League Club vs. Black River Regu*
> *lating District*, 275 App. Div. 618, 621.

All this was before the interposition of the Stokes Ac
passed while the League Club's appeal to the Court o
Appeals was pending.

We recognize, and know that the appellant Regulatin
Board recognizes, the very considerable limitations lai
down by this Court regarding "determination of th
scope and constitutionality of legislation in advance o
its immediate and adverse effect in the context of a con
crete case"[4]. "Constitutional questions are not to b
dealt with abstractly"[5]. "The constitutionality of an ac
is not drawn into question except in connection with it
application to some person, natural or artificial"[6]. It i
a long-established principle that "this Court can hav

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[4] *International Longshoremen's* case, 347 U. S. 222, 224; 74 S. C
447, 448.

[5] *Bandini Petroleum Co.* case, 284 U. S. 8, 22; 52 S. Ct. 103, 10

[6] *White vs. Johnson*, 282 U. S. 367, 373; 51 S. Ct. 115, 118.

no right to pronounce an abstract opinion on the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here'"[7].

This Court has taught "that one who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. He should apply and see what happens'"[8] and that "assumed potential invasions of rights are not enough to warrant judicial intervention'"[9].

The proceeding to condemn the League Club's land under the right of eminent domain granted to the Regulating Board (New York Conservation Law, Section 431) remained after the Court of Appeals ordered dismissal of the declaratory judgment action. The condemnation proceeding was an actual, concrete litigation, and certainly it would seem the proper framework in which to present the many questions of invasion of rights thought to be permanent and substantial, and to be protected by the Constitution of the United States. So it was appropriate for the River Regulating Board to assert—*now as a matter of defense*—that the Stokes Act of 1950 was invalid so far as it would prevent completion of Panther Mountain Reservoir, a project duly approved as a part of the "Official Plan" since April 30, 1920, and so

[7] *Cherokee Nation vs. Georgia*, 5 Pet. 1, 75 as quoted in *New Jersey vs. Sargent*, 269 U. S. 328; 46 S. Ct. 122.

[8] *Highland Dairy Farms* case, 300 U. S. 608, 617-618; 57 S. Ct. 549, 553, See also *Bourjois, Inc., vs. Chapman*, 301 U. S. 183, 188; 57 S. Ct. 691, 694.

[9] *Ashwander vs. T. V. A.*, 297 U. S. 288, 324-5; 56 S. Ct. 466, 473.

far progressed that a very large amount[10] had been spent for necessary engineering and legal expenses, including site studies, borings, preparation of construction plans, surveys, public hearings, etc.

The reiteration of unconstitutionality of the Stokes Act now made did not avail appellant Regulating Board. Both Special Term, silently, and the Appellate Division in its memorandum (285 App. Div. 1115), explicitly, bowed to the prior language of the Court of Appeals. To recognize this is not in any way to admit appellee's claim of *res judicata.*

Appellant then took on constitutional grounds its appeal to the Court of Appeals. The New York Court of Appeals then had the opportunity to correct its previous failure properly to understand the constitutional issues and to correct the procedural tangle for which it was so largely responsible.

When the Court of Appeals by its order of October 13, 1955, made definite and final its application of the Stokes Act to the rights of appellant asserted in the condemnation proceeding there came into being the first "judgment" properly appealable to this Court. Any prior appeal would have been premature[11].

Now the reliance of the Regulating Board, the City of Watertown, and all the other owners of "public and pri-

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[10] The record shows that $203,000.00 in certificates of indebtedness issued by the Regulating Board to pay such preliminary expenses were duly issued and outstanding prior to passage of the Stokes Act. The Appellate Division in its opinion, 282 App. Div. 161, at page 169, notes that "according to the complaint the plaintiffs will be unable to meet these contract obligations * * * except from the proceeds of a bond issue and bonds may not be issued if the project is halted at this juncture."

[11] *Utah Power & Light Co. vs. Pfost, Commissioner,* 286 U. S. 165, 186; 186 S. Ct. 548, 554:

"It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that 'a litigant can be heard

vate property and municipalities benefited'"[12] within the entire watershed of the Black River is upon this Supreme Court for the protection of their fundamental rights.

III.

There are here fairly presented the three classic questions as to whether State Legislation (The Stokes Act) impairs the obligation of a contract.

Detroit United Railway vs. Michigan, 242 U. S. 238, 249, 37 S. Ct. 87, 61 L. Ed. 268, 274.

They are:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

"We are required to determine these questions upon our independent judgment," wrote Justice Pitney.

For the City of Watertown we would respectfully submit that here there are *two* contracts entitled to constitutional protection.

The *first contract* is one between the State and the District, culminating in a franchise, defined in the Of-

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to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage' (cases cited). Primarily, the construction of these provisions of the statute is for the state Supreme Court, and we cannot assume in advance that such a construction will be adopted, or such an application made of the provisions, as to render them obnoxious to the Federal Constitution. * * *"

[12] New York Constitution, Article XIV, Section 2, as approved in 1913 as then Article VII, Section 7.

ficial Plan of the District. This was authorized by the adoption in 1913 of the amendment to the Constitution then known as Article VII, Section 7. The next stage in the formation of the contract may be considered to be the legislative offer made when Article VII-a of the Conservation Law was enacted as Laws 1915, Chapter 662. Amendments followed: Laws 1916, Chapter 584; 1920, Chapter 463, and 1921, Chapter 672. The first acceptance of the offer was in 1919, evidenced by the petition of the City of Watertown, and other municipalities and taxpayers within the watershed. On their initiative and by *their voluntary act* (Conservation Law, Section 432) and upon the approval of the State Commission consisting then of the Attorney General, the Conservation Commissioner and the State Engineer and Surveyor, there came into being the "public corporation" which is known as Black River Regulating District.

Those within the proposed district who did not join in the petition for its creation but who on its formation would become obligated for their shares of the cost of the improvement of the river system may be considered also as incorporators by their tacit consent to the creation of the district. When no objections were filed by these, under the rights given by Section 434 of the Conservation Law, consent is presumed. Upon incorporation of the District, there attaches liability to pay for its authorized works.

We have then all the essentials of a contract: 1. Parties —(a) the State, (b) a voluntary corporation including those within the District expecting to be benefited and incurring the obligations to pay for construction and for maintenance; 2. Subject Matter—the conservation and use of water within the limits of the watershed of Black River; 3. Offer—including the right to become a corporation with the powers of eminent domain and to use

the waters impounded in reservoirs to be constructed on lands including not more than three per cent of the state-owned forest preserve; 4. Consideration—public benefit as expressed in Section 430 (3) of the Conservation Law, benefits to the downstream communities, industries and property owners with such benefits to form the basis of assessment of costs upon them, and the obligation correspondingly assumed; 5. Acceptance. 6. Part performance by the construction of Stillwater Reservoir.

The *second contract* is that between the District and the holders of its certificates of indebtedness in the present amount of $203,000, "duly issued" (Complaint, paragraph 15) and "which represent debts duly incurred for preliminary work done in connection with construction of Panther Mountain Reservoir."

A "legislative contract" is no new concept.

> *Louisiana vs. Pilsbury*, 105 U. S. 278, 288;
> *New Jersey vs. Yard*, 95 U. S. 104, 114;
> *State vs. Brand*, 303 U. S. 95, 100, 58 S. Ct. 443, 446.

In the *Louisiana* case we read at page 288:

> "* * * Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued or certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions."

In the *New Jersey* case there is this sentence at page 114:

> "It has become the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and

> the State within the protection of the clause referred to of the Federal Constitution."

We would add to appellant's citation of the *South Bend* case, 227 U. S. 544, and the Los Angeles case of *Russell vs. Sebastian*, 233 U. S. 195, that of *Houston and Texas Railway vs. Texas*, 170 U. S. 243, 257, 261.

Here it was the improvement of the river's flow by a series of reservoirs, not only Stillwater Reservoir, but Panther Mountain and other reservoirs, to be built in stages over a number of years. This is what was asked for and intended when the New York Constitution was amended in 1913 to give the necessary permission; it is what was contemplated when the river regulating article was added to the Conservation Law in 1915; it is what induced this City and other interested riparian owners to bring the Regulating District into corporate existence when the City and they made their petition in 1919; it is what the general plan of the District described in detail and what the New York State Water Power and Control Commission approved in 1920 to become the "Official Plan" [13] of the District.

This City on construction of the Stillwater Reservoir as the first project of the District, became subject as a "benefited" municipality to its share of its cost, apportioned "to the extent of the benefits received," as provided by Article XIV, Section 2, of the New York Constitution. The Stillwater bonds have not yet been fully paid off. For the preliminary expenses duly incurred for a reservoir on the Moose River tributary (Panther Mountain) over two hundred thousand dollars ($200,000) worth of certificates of indebtedness were duly issued by the District and are presently outstanding and due. These were issued pursuant to Section 466 of the Conservation Law (since repealed), in anticipation of the sale

[13] New York Conservation Law, Section 445.

of bonds for the construction of the reservoir. Section 464 expressly provides that any such bonds shall not be considered as an indebtedness of the State and that the State shall not be obligated to pay their principal or interest.

In brief, we have a benefit assessment set-up, with obvious benefits waiting to be realized from Panther Mountain Reservoir, similar to those being received from its exact counterpart at Stillwater. The Stokes Act arbitrarily halts the completion of a Panther Mountain Reservoir, leaving a debt of $203,000 bearing upon this City and the others within the District "public and private" who would have been benefited, *without any provision whatever for repayment of this debt.* And this against the background of countersignature of each of Series A to L of these certificates of indebtedness by the Comptroller of the State of New York, over a period of twenty years or more!

The reasons for the legislative action are not here pertinent; the original offer of a right or franchise to improve the watershed by river regulation was an "entirety," and not a right to be afforded—or withdrawn—piecemeal.

Something very substantial has been taken away by the Stokes Act, benefits justifying the City of Watertown and the other owners of public and private property within the District in themselves paying the estimated cost of $6,000,000 or more for the construction of Panther Mountain Reservoir, to provide this great betterment without cost to the taxpayers of the State at large.

IV.

Other states have taken the correct view of the matter.

In Oklahoma it has been held that not even a constitutional amendment was effective to nullify the authority previously granted to a state agency to sell bonds to complete a river improvement. An additional amount above the first issue of bonds was required and the right to issue these after the passage of a prohibitory constitutional amendment was upheld.

Wickkam vs. Grand River Dam Authority, 118 Pacific (2) 640.

In a later case, this Court characterized the Grand River Authority as a "conservation and reclamation district created in 1935, by the Oklahoma Legislature. It is a corporate agency of the State • • •."

335 U. S. 359, 362; 69 S. Ct. 114, 116.

The opinion of the Oklahoma Supreme Court recites the powers given to the Dam Authority, including those to control, store and preserve the waters of the Grand River and its tributaries, for irrigation, water power, electric energy and other purposes, and also points out that all its bonds were to be paid from funds derived from charges for use of the completed project. No other means were provided for payment of the obligations of the Authority (118 Pacific [2] at p. 644). This resemblance to the situation of the Black River Regulating District is striking.

The Mississippi Supreme Court, in 1949, passed on the issuance of bonds for repair of a drainage district system after some 20 years of operation.

Buchanan vs. Red Banks Creek District, 39 Southern (2) 321:

> "It will not be doubted that in organizing and financing a new district, the theory of proportionate benefits is paramount. Actual resultant benefits are at once the justification for, and limitation of, the assessments. The district is the creature of its members, and in turn the creator of their benefits. Their right to bind themselves in such common cause is measured by their duty to maintain this political entity, and their original investment. If in their union there is to be found a new strength, so must also there be found strength in the union" (323).
>
> "The drainage act is a whole and united scheme that is visioned to run from organization in perpetuity" (p. 327).

So, too, was the improvement of the Black River intended when its Regulating District was conceived through the petition for its incorporation to which in 1919 this City of Watertown was the first signatory. When its "Official Plan" was approved by the State in 1920, and ever since, it has been and now should be held:

> "a whole and united scheme"

intended to have, and entitled to, permanence.

The opinion in *Drainage District No. 7 vs. Hutchins,* 42 S. W. (2) 996, 1000; 184 Ark. 521, 529, states:

> " * * * local improvement districts and their commissioners are governmental agencies created as *quasi* public corporations deriving their powers directly from the Legislature and exercising them as the agent of the property owners in the district whose interests are affected by the duties they perform. They exercise no governmental powers except those expressly or impliedly granted by the Legislature. They are not political or civil divisions of the state like counties and municipal corporations created to aid in the general administra-

> tion of the government. They are not created for political purposes or for the administration of civil government. Hence, no public policy would be violated by applying the same rules for the services of process upon them as are prescribed for private corporations and *quasi* public corporations, such as railroads, etc." [14]

Even considered as an agent of the State, the appellant Regulating Board here had an authority *coupled with an interest* which could not be revoked under the principle declared by this Court a century ago in another case from Arkansas:

> *Curran vs. State of Arkansas*, 15 How. (U. S.) 304, 313.

The State of Arkansas chartered a bank, became its sole stockholder. "But the bank was a distinct trading corporation, * * * enabled to enter into valid contracts binding itself alone * * *" (p. 308). The Supreme Court held, "The assumption that, because the legislature may destroy a contract by repealing the charter of the corporation which made it, therefore, such a contract may be impaired, or altered, or destroyed, in any manner the legislature may think fit, without repealing the charter, is wholly inadmissible" (p. 312). It said further in the opinion:

> "If a person deposit his property in the hands of an agent, he may revoke the agency and withdraw his property at his pleasure, but if he should request third persons to accept the agent's bills, informing them, at the same time, that he had placed property in the hands of that agent to meet the bills at their maturity, and upon the faith of such assurance the agent's bills are accepted, the principal cannot by revoking the agency, acquire the

[14] This quotation was adopted in *District No. 2 vs. Mercantile Bank*, 69 Fed. (2) 138, 140.

right to withdraw his property from the hands of the agent.

"It is no longer exclusively his. They who, on the faith of its deposits, have changed their condition, have acquired rights in it. The matter no longer rests in a mere delegation of a revocable authority to an agent, but a contract has arisen between the principal and the third persons from the representation made, and the acts done on the faith of it, and the property cannot be withdrawn without impairing the obligation of that contract" (at pp. 313, 314).

V.

It is neither due process nor the equal protection of the laws to legislate that a reservoir may not be built by appellant on a particular branch of a tributary river in either of two specified counties when the appellee is left entirely free to construct thereon a similar reservoir.

Upstream within 4 miles of the actual dam site proposed by appellant there is on the private lands of appellee another site[15] for a dam which would make a reservoir including much of the area which would be flowed by Panther Mountain Reservoir. The League Club remains entirely at liberty to develop this reservoir site, even for power purposes if it would. (The League Club already and for many years has been engaged in what it has itself called scientific lumbering of its large acreage.)

Likewise, the Stokes Act leaves appellant District free to build on other branches (north or middle) of the

[15] Near Combs springhole, left center U. S. G. S. map, Old Forge, N. Y., quadrangle.

Moose in the two counties, or on the main stem of the Moose only about 5 miles to the west of the site in controversy, over the boundary line in Lewis, a free county. (The pity is that none of these possibilities are economically feasible.)

No possible argument based on the police power can justify such arbitrary legislation. Stillwater Reservoir on a parallel tributary about 20 miles downstream stands as a demonstration and proof of more than 30 years service that the benefits to come from a similar reservoir at Panther Mountain should be realized.

We quote Justice Hughes:

> "These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise, when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made, and there was nothing but a license, which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate."
>
> *New York Electric Line Company vs. Empire City Subway Company,* 235 U. S. 179 at 193, 59 L. Ed. 184, 192.

The Stokes Act is "tainted with the leprosy of repudiation" (*Louisiana vs. Pilsbury,* 105 U. S. 278, at p. 300).

It should be extirpated, for, as was said in the *Pilsbury* case:

> "Legislation of a State thus impairing the obligation of contracts made under its authority is null and void, and the courts in enforcing the contracts will pursue the same course and apply the same remedies as though such invalid legislation had never existed."
>
> 105 U. S. at page 302.

VI.

As to the Ostrander Amendment to the New York Constitution.

If the Stokes Act is held ineffective here, the reasons impelling such decision will apply equally to this amendment, voted in November, 1953 and taking effect January 1, 1954.

An amendment of the California Constitution was held by Justice Hughes to be ineffectual in:

Russell vs. Sebastian, 233 U. S. 195, 58 L. Ed. 912,

as was a Texas amendment in the *Houston* and *Texas Railway* case, 170 U. S. 243, 257, 261, with Chief Justice Fuller writing.

New York State is subject to the same rule, which was well put by Justice Harlan in the *New Orleans Gas Co.* case, 115 U. S. 650:

> "A state can no more impair the obligation of a contract by her organic law than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the national Constitution."
>
> 115 U. S. at bottom of page 672.

VII.

Other substantial questions of Constitutional Law ar presented.

It would be "unamicable" for us to extend this brie to full length, especially since the motion of appellee t dismiss pending at this time is on technical grounds rathe than upon the merits. We respectfully request that thi Court note probable jurisdiction of the appeal. Afte that is done, and with the permission of the Court, th City of Watertown will be pleased to make further sub mission if it may be thought helpful.

VIII.

Conclusion.

The City of Watertown earnestly prays that this Cour may examine the merits of this controversy, and in thi litigation decide the many and important constitutiona questions involved, and which ultimately must be resolved

Respectfully submitted,

THE CITY OF WATERTOWN, NEW YORK.
By PAUL E. BROWN,
Counsel.

KENNETH W. BRETT,
Its Corporation Counsel and authorized law officer.

April 16, 1956.

APPENDIX.

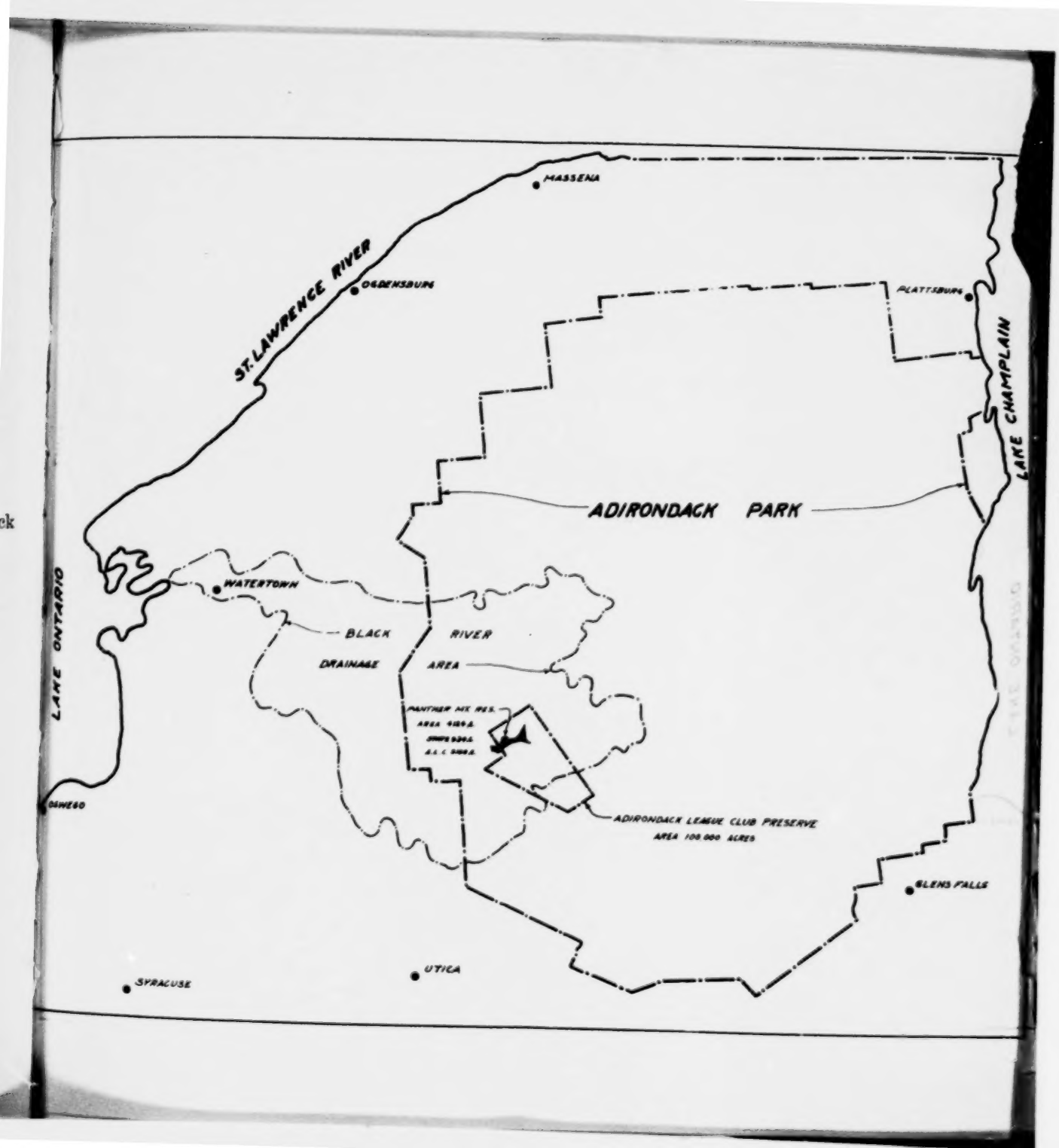
Page

1. Outline map showing location and boundaries of Black River Regulating District 24
2. Map showing state and private lands in Adirondack Park 26
3. Copy of petition by City of Watertown and others (1919) for creation of Black River Regulating District as a corporation 28

Appendix 1.

Outline map showing location and boundaries of Blac
River Regulating District.

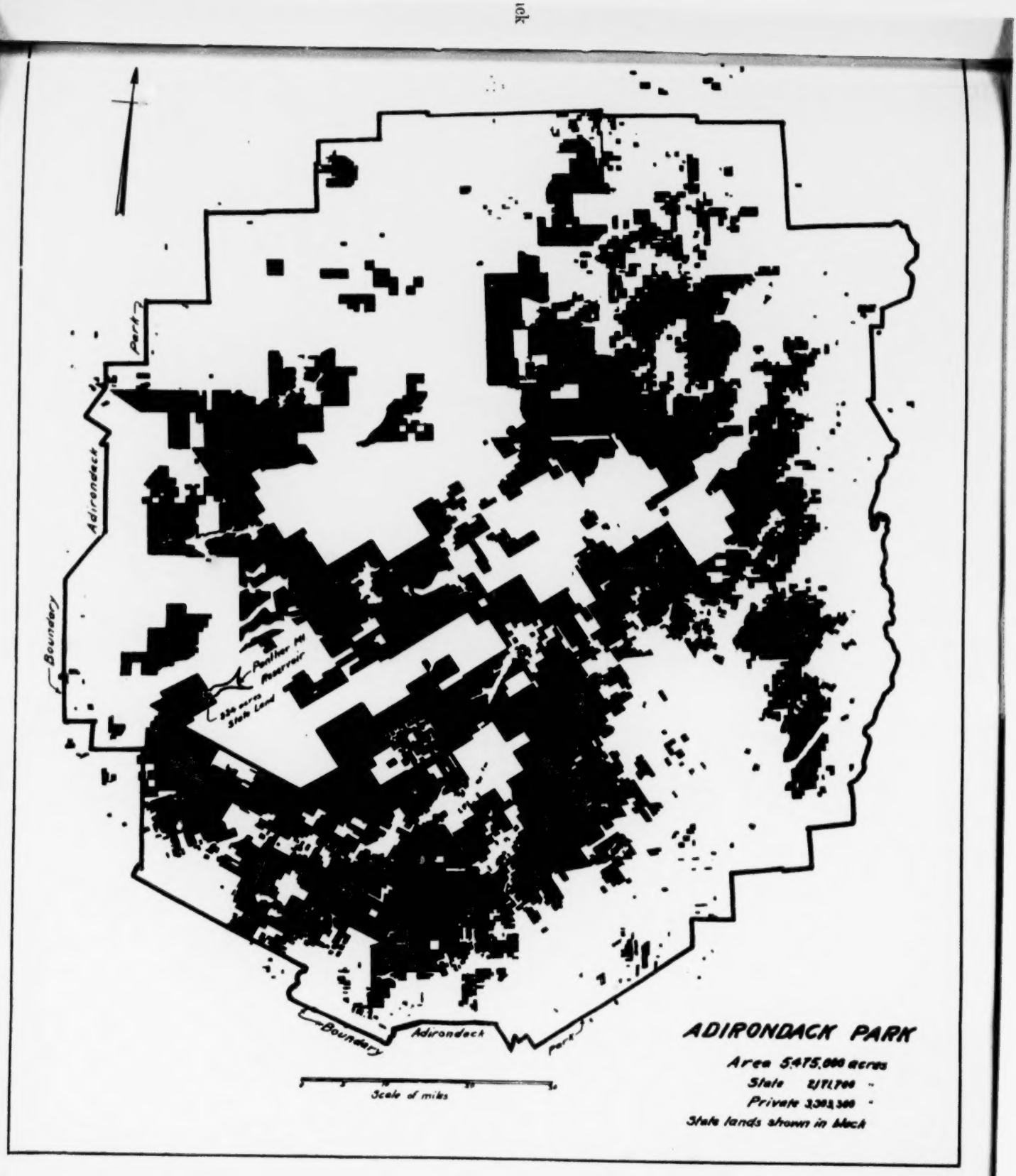
(See opposite page.) ☞


MASSENA
OGDENSBURG
ST. LAWRENCE RIVER
PLATTSBURG
LAKE CHAMPLAIN
ADIRONDACK PARK
LAKE ONTARIO
WATERTOWN
BLACK RIVER
DRAINAGE AREA
PANTHER MT. RES.
AREA 9000 A.
POND 900 A.
A.L.C. 5000 A.
OSWEGO
ADIRONDACK LEAGUE CLUB PRESERVE
AREA 100,000 ACRES
GLENS FALLS
SYRACUSE
UTICA

Appendix 2.

Map showing State and private lands in Adirondack Park.

(See opposite page.) ☞


Adirondack Park
Boundary
Panther Mt Reservoir
336 acres State Land
Boundary
Adirondack Park
Scale of miles
ADIRONDACK PARK
Area 5,475,000 acres
State 2,171,700 "
Private 3,303,300 "
State lands shown in black

Appendix 3.

PETITION FOR CREATION OF BLACK RIVER REGULATING DISTRICT

To the Conservation Commissioner, the Attorney General and the State Engineer, Constituting the Commission Under Chapter 662 of the Laws of 1915 of the State of New York, and the Acts Amendatory Thereof:

The petition of the undersigned respectfully shows:

First: That your petitioners are residents or owners of real estate within the district herein asked to be created, or public corporations whose boundaries lie wholly or partly within such district.

Second: Your petitioners pray that a river-regulating district be created under and pursuant to said Chapter 662 and the acts amendatory thereof to regulate the flow of the Black River and its tributaries, and that the name of such district be the "Black River Regulating District."

Third: That the Black River is one of the largest and most important rivers of the State; it and its principal tributaries, the Moose and Beaver Rivers, have their headwaters in the Adirondacks. It is about one hundred and fifty (150) miles long, drains the westerly slope of the Adirondack Mountains, and empties into Lake Ontario at Dexter, N. Y., that the watershed of said river has a total area of approximately one thousand nine hundred and eighteen (1,918) square miles.

That said Adirondacks constitute a high plateau located in Northern New York, having an area of many thousand square miles; that within the area so designated there is a heavy annual fall of rain and snow; that the average annual rainfall for the Black River water-

shed as a whole is forty-six (46) inches, while for that portion thereof within said Adirondack region the rainfall is greater; that from about the first of December in each year to about the following March or April, the coldness of the climate causes large quantities of snow and ice to accumulate on said watershed; each spring the melting of snow causes a freshet of said river, with the result that vast quantities of water rush unrestrained to said lake, causing said river in places to overflow its banks, inundate the area adjacent to said banks, and threatening and doing great damage to property along said river.

That the average flow of Black River at the City of Watertown, N. Y., which is located about twelve (12) miles from the mouth thereof, is over thirty-six hundred (3600) cubic feet of water per second; that said river is very irregular and in the spring freshets discharges as high as thirty thousand (30,000) cubic feet of water per second, while during the summer months the volume of its flow falls below five hundred (500) cubic feet of water per second.

That from Lyons Falls to Carthage, a distance of about forty (40) miles, the Black River is navigable and is a part of the Black River Canal; that said canal proper runs from Lyons Falls through Boonville to Rome and is now used as a feeder for the Erie Canal; that through reservoirs, especially the reservoir at Forestport, water is impounded to feed said canal, and during the period of navigation, which includes the low-water months of the year, approximately two hundred and ten (210) cubic feet of water per second are and for many years have been diverted through said canal from the Black River watershed to the Erie Canal or (now) to the Mohawk River canalized; that to compensate for such diversion the State has constructed reservoirs, one with its dam at Old Forge on the Middle branch of the Moose River, one at Sixth

Lake on said branch and one at Stillwater on the Beaver River; that the capacity of these reservoirs is inadequate fully to compensate for the water so diverted.

The City of Watertown and the Villages of Dexter, Brownville, Glen Park, Black River, Felts Mills, Great Bend, Carthage, West Carthage, Lyons Falls, Boonville, Port Leyden, Glenfield, Lowville, Croghan, Beaver Falls, Deferiet and Herring are adjacent to said river and its tributaries and within such proposed district, and there are many other villages and towns adjacent to said river and its tributaries within such district. That between Lyons Falls and the level of Lake Ontario there is on Black River proper a fall of approximately five hundred (500) feet. That on the Beaver River there is a fall, between the present Stillwater Dam thereon and the junction of said river with the Black, of approximately six hundred (600) feet. That on the Moose River there is a fall of approximately five hundred (500) feet.

That the industrial life of these communities and of said district is limited in development on account of the irregularity in flow of said river, and by reason thereof, especially during the months of low water and the periods of high water, industrial activity and regularity of employment are interrupted because of shut-down of manufacturing plants for lack of power.

That the Northern New York Utilities, Inc., of Watertown, N. Y., is a public service corporation owning valuable water powers developed on said river and its tributary, the said Beaver River, and furnishes light and power created thereby to the City of Watertown and to most of the villages within said watershed, or to the people thereof; and in a smaller way the Empire Wood Pulp Company of Black River, N. Y., performs a like service.

The Village of Boonville has a municipal lighting and power plant, deriving its power from Black River.

That the Black River Traction Company is a public service corporation operating a street railway in the City of Watertown, and from said City to the Village of Dexter and derives its power for such operation from said Black River.

That the City of Watertown, with a population of over thirty thousand (30,000) people, depends for its municipal supply and for protection from fire upon the use of the water of Black River; that said water before use is mechanically filtered; the filtration process is seriously strained during times of freshet, and during the summer periods of low water the condition of the water is such after filtration that it has a disagreeable taste which rends it unpalatable; that this condition is not noticeable during periods of normal flow of the river.

The ground-water levels in the State of New York have during the last hundred years been lowered about nine (9) feet. In other words, these levels are nine (9) feet farther below the surface than they were one hundred (100) years ago; the result is that agriculture is now forced to rely upon rainfalls instead of subsoil waters for support of plant life, with the result that it suffers from shortage of crops during periods of drouth; it is believed that could the flow of Black River and its tributaries be so regulated that at the reservoirs and on the stream itself the water would be raised to an even height and have time to percolate to the subsoil, the ground-water levels of the watershed would in time be materially raised to within the reach of plant life, and the conditions of agricultural activity materially improved and the productivity of the soil materially increased.

The only feasible method of regulating the flow of said river, or of the other rivers of the State, is by the construction and operation of storage reservoirs.

Fourth: That the territory included in the proposed district is sufficiently described as the watershed of Black River and comprises parts of Hamilton, Herkimer, Lewis, Oneida and Jefferson Counties of the State of New York.

Fifth: It is possible through the construction and operation of reservoirs on this watershed to regulate the flow of Black River so that the minimum flow will be not less than two thousand (2,000) cubic feet of water per second, and it is believed that this minimum flow can in time be increased by the development of all the storage possibilities so that the minimum flow would be not less than two thousand five hundred (2,500) cubic feet of water per second.

Sixth: Both State and private lands will be required to the extent—as to State lands—of not exceeding six thousand (6,000) acres, while a certain quantity of private lands, substantially all of which are Adirondack lands, the extent of which your petitioners are now unable to state with accuracy, will also be required for such regulation of the water of said stream as is practicable. It is estimated that not exceeding thirty thousand (30,000) acres of land owned by the State of the Forest Preserve will be required to furnish sites for all reservoirs which will ever be constructed; that the Forest Preserve consists of approximately two million (2,000,000) acres, and to furnish all available reservoir sites for all rivers requiring the use of State-owned lands of the Forest Preserve much less than the three per cent (3%) thereof allowed to be used for such purpose by Section Seven of Article Seven of the State Constitution will be required.

That the regulation of the flow of said Black River by storage reservoirs will control the flood conditions thereof, decrease the danger to life and loss to property, improve health and sanitary conditions, benefit municipal water supply and municipal lighting, prevent the danger to bridges and obstruction to highways during freshet pe-

riods, facilitate public travel and intercourse, improve agricultural and industrial conditions, afford steady employment for labor, establish the basis for future industrial development, increase the value of property, promote the general public good within said district, and will subserve the objects and purposes of said Chapter 662 of the Laws of 1915, and the Acts amendatory thereof.

WHEREFORE, Your petitioners pray that your Honorable Commission will create the Black River Regulating District pursuant to and for the purpose of Chapter 662 of the Laws of 1915, and the Acts amendatory thereof.

(Signed) City of Watertown, by I. R. Breen, Mayor.
Village of Dexter, by W. H. Thee, President.
Village of Black River,
Silas W. Butts, President.
Village of Carthage,
Frank P. Murtha, President Pro Tem.
Carthage Chamber of Commerce,
W. A. Trowbridge, Secretary.
Watertown Chamber of Commerce,
F. H. Lamon, Secretary.
Empire Wood Pulp Co.,
F. L. Carlisle, President.
Village of Brownville,
by J. H. Lingenfilter, President.
Village of Glen Park, N. Y.,
by Solomon McAdam, President.
Northern New York Utilities, Inc.,
by F. A. Rogers, Vice-President.
Pa Pro Co., by H. S. Lewis, Vice-President.

Village of Croghan,
by E. H. Radigan, President.
Chamber of Commerce of the Village of Croghan, Jacob Weerich, President.
Village of Boonville, E. L. Wooley, President.
Village of Port Leyden, by W. H. Burk.
Village of Lyons Falls,
by E. C. Gaylord, President.
Black River Traction Co.,
by Delos M. Cosgrove, Secretary.
Village of West Carthage, N. Y.,
C. J. Hull, President.

Presented March 13, 1919.

As printed in N. Y. Legislative Document (1921) No. 95—Appendix, p. 18.

Office - Supreme Court, U. S.
APR 23 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 732

THE BOARD OF THE BLACK RIVER REGULATING DISTRICT,
Appellant,

vs.

ADIRONDACK LEAGUE CLUB,
Appellee.

APPELLEE'S REPLY TO THE BRIEF OF THE CITY OF WATERTOWN "AS *AMICUS CURIAE*"

I

On March 5, 1956, the Appellant filed its "Jurisdictional Statement". On March 30 the Appellee filed its "Motion and Brief for Dismissal". On April 13 the Appellant filed its "Brief Opposing Motion to Dismiss".

Now (April 23), *ten days* after all this had been consummated, the City of Watertown suddenly files a brief "*amicus curiae*", ostensibly in Appellant's support.

The several litigations by the Black River Board against the Adirondack League Club went through the New York Court of Appeals *four times* without any inter-

vention, filing of brief, or appearance by the City of Watertown in that Court,—301 N. Y. 219 (1950), 307 N. Y. 475 (1954), 307 N. Y. 906 (1954), and 309 N. Y. 798 (1955).

The City of Watertown is without any legal standing at all. In effect it demands that the United States Supreme Court order that 1500 acres of New York State's own Forest Preserve land in the Adirondacks be hereafter occupied by a Dam and Reservoir the construction of which has not even "actually been commenced" (301 N. Y. 219, 222),—and this notwithstanding that the owners of these 1500 acres (—the People of the State of New York—) have twice voted flat and unqualified prohibitions by enormous majorities in state-wide referendums. (See pages 13-16 of Appellee's Motion for Dismissal.)

The City of Watertown, situated near Lake Ontario, has no right whatever in or over the public lands of the State in the Adirondacks. Nor has it any standing to break down the dedication of such lands by the State Constitution as a perpetual inheritance "for the people of the State as a whole". (*Association for the Protection of the Adirondacks* v. *MacDonald*, 253 N. Y. 234, 238.)

In the 1955 state-wide referendum on the Panther Dam and Reservoir, the vote in Jefferson County (containing Watertown) was 10,639 for and 5,663 against, whereas in the entire State the vote *against* was 1,622,196 and the vote for was only 613,927,—*an adverse majority of 1,008,269.*

II

The City's brief states that in 1954 the Court of Appeals dismissed the declaratory judgment action as "a matter of discretion" (pp. 6, 7).

It did no such thing.

Each of the seven questions certified by the Appellate Division to the Court of Appeals were expressly presented *"as a matter of law"*. (See their enumeration and quotation in 307 N. Y. 475, 486.) Indeed, under the law they could not have been certified at all unless they were decisive "questions of law." (N. Y. Civil Practice Act, Sec. 589, subd. 4a.)

In consequence, the responses of the Court of Appeals were of necessity made *as a matter of law,* namely:

> (1) The plaintiffs, as a Board or as individuals, "are *effectively barred* from maintaining condemnation proceedings". (p. 489)
>
> (2) The plaintiffs, as a Board or as individuals, * * * "have no standing *in law* either to challenge the applicability of the Stokes Act or the Ostrander Amendment". (p. 489)
>
> (3) "The Stokes Act is constitutional". (p. 490)
>
> (4) "The inclusion of Panther Mountain Reservoir in the official plan did not vest in petitioners per se a contractual interest, either in the proposed site or in the construction of a reservoir, which could not be impaired by legislative action." (p. 488)

These were all rulings of law on issues expressly certified as controlling and decisive issues of law. Inevitably

they led to and constituted a judgment of dismissal on the merits as a matter of law. In the opinion and decision of the Court of Appeals there is no reference to "discretion" or to dismissal as a matter of discretion.

III

Hence, that was the moment—July 14, 1954—when the Appellant might have attempted to seek in this Court a review of the rulings by the State Court of Appeals that the Stokes Act and the Ostrander Amendment were constitutional as a matter of law; although, if the attempt had been made, we would have resisted on the ground (among others) that the Court of Appeals had also assigned adequate non-federal grounds for the same result as matter of law.

The State Court of Appeals was not bound to answer only one of the seven questions of law certified by the Appellate Division. It had power to answer such as were federal and such as were non-federal. In this case, it did both.

But the Appellant, instead of then attempting to appeal to this Supreme Court, let the time and the occasion pass,—now by nearly two years.

Thereby the Appellant allowed all the rulings made by the State Court of Appeals as matters of law on questions certified "as a matter of law", *to become res judicata and estopped by judgment.*

Thus, those rulings became forever final and conclusive between these parties not only in the declaratory judgment action but in all other actions, including the Appellant's condemnation action which had been held im-

mobile pending a declaratory judgment by the Court of Appeals on whether the Appellant was barred as a matter of law from maintaining it. That the Appellant was so barred "in law" was precisely one of the rulings of law made by the Court of Appeals (307 N. Y. 475, 489).

IV

In consequence, when the Appellate Division subsequently affirmed the Special Term's dismissal of the Appellant's condemnation proceeding and did so expressly on the ground of *res judicata*, the Appellate Division was right and its decision was on an adequate non-federal basis (285 App. Div. 1115, April 1955).

By the same token, the Court of Appeals was equally right in subsequently dismissing the Appellant's attempted appeal to it as matter of right. The attempted appeal was beyond its statutory and constitutional jurisdiction, since the Appellate Division's decision was not on a constitutional issue (309 N. Y. 798, October 1955). (See our Motion for Dismissal, pp. 4-6.)

V

The City's brief speaks of "untangling the procedural snarl" (p. 4), and of "the procedural tangle for which it (the Court of Appeals) was so largely responsible" (p. 10).

It also speaks of "the legal vacuum of its (the Court of Appeals') own creation" (pp. 6, 7), and impeaches the Court of Appeals for "failure properly to understand the constitutional issues" (p. 10).

These unwarranted reflections on the Court of Appeals are mere effrontery.

The only "tangle" was created when this Appellant in 1954, having had its day in the Court of Appeals on the issue of law as to whether it was "effectively barred from maintaining condemnation proceedings," elected to add defiance of the principle of *res judicata* to its defiance of the Legislature, the Governor, the Attorney-General and the People of the State of New York. (See our Motion for Dismissal, pp. 13-16.)

The only "vacuum" was created when in 1954 this Appellant elected to omit any attempt to appeal to the United States Supreme Court.

VI

But, aside from everything else, the belated arrival of the City of Watertown as a would-be *amicus curiae* makes crystal clear that this appeal *is mere shadow-boxing,—an wholly academic exercise.*

This Panther Mountain Dam, which has not yet even been commenced, could not possibly be built at all without seizing and permanently occupying 1500 acres of the State's Forest Preserve (301 N. Y. 219, 222).

This minor state agency cannot sue the State; and the State itself, by repeated actions of its Legislature, Governor, Attorney-General and People, has repeatedly told this Appellant to keep its hands off those 1500 acres of State land.

The Appellant could not possibly dispossess the State; and we cannot imagine this Court directing any court to oust the State.

Thus, the Panther Mountain Dam is actually as dead as the Dodo. As far back as July 1950 the State Court of Appeals stated that it was "effectively and completely disposed of" (301 N. Y. 219, 222).

Hence, in reality, this appeal is mere discussion of a corpse which no amount of judicial decision could now make rise up and live.

Respectfully submitted,

Breed, Abbott & Morgan,
Attorneys for Adirondack League Club,
Defendant-Appellee,
15 Broad Street,
New York 5, N. Y.

Charles H. Tuttle,
Of Counsel.